TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 810.

FOX FILM CORPORATION, PETITIONER,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 24, 1922.

CERTIORARI AND RETURN FILED MAY 11, 1922.

(28,780)

(28,780)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 310.

FOX FILM CORPORATION, PETITIONER,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Record from the district court of the United States for the eastern district of New York	1	1
Bill of complaint	1	1
Answer of defendant Knowles	14	7
Answer of Klein, Morris, and Baret	18	8
Answer of defendant Corse Payton and Corse Payton Stock Co.	22	10
Notice of motion by defendant Knowles to dismiss	25	12
Notice of motion by Klein, Morris, and Baret to dismiss	27	12
Opinion, Chatfield, J	29	13
Affidavit of Fred Francis Weiss	35	16
Final decree	41	18
Petition for appeal	43	19
Order allowing appeal	45	20
Assignment of errors	46	20
Citation	51	22
Bond on appeal	53	23
Stipulation as to transcript	58	25
Clerk's certificate	59	25
Proceedings in circuit court of appeals	60	26
Per curiam opinion	60	26
Order for mandate	61	26
Clerk's certificate	63	27
Writ of certiorari and return	64	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1922.

1 *Bill of Complaint.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Complainant,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK CO., and JOHN KAISER, Respondents.

To the Honorable the Judges of the District Court of the United States for the Eastern District of New York:

The complainant complaining of the defendants, alleges:

First. That at all the times hereinafter mentioned the complainant was and still is a corporation duly organized and existing under and by virtue of the Laws of the State of New York, and having its principal place of business in the Borough of Manhattan, City
2 of New York, in the Southern District of New York, and is a citizen of the United States.

Second. Upon information and belief, that at all the times hereinafter mentioned the defendants Joseph Klein, Joseph Morris, Louis Baret, Corse Payton and Corse Payton Stock Co. were the lessees of and managed, controlled and operated a certain place of public entertainment or theatre known as "The Amphion Theatre" located at Bedford Avenue and South Ninth Street, in the Borough of Brooklyn, City of New York, in the Eastern District of New York, and, on information and belief, that each of said defendants are residents of the Borough of Brooklyn, City of New York and County of Kings.

Third. On information and belief, that at all the times hereinafter mentioned the defendant Corse Payton was engaged in the production of plays and conducted and gave dramatic and theatrical performances at the said Amphion Theatre during all the times hereinafter mentioned under the name and style of Corse Payton Stock Co.

Fourth. On information and belief, that at all the times hereinafter mentioned the defendant Frederick M. Knowles was and still is a resident of the County of Queens, in the City and State of New York.

Fifth. On information and belief, that prior to February 21st, 1873 one Will Carleton, a citizen of the United States, in-
3 vented, originated, created and wrote a series or collection of poems entitled "Farm Ballads," which contained two certain poems entitled "Over the Hills to the Poor House" and "Over the Hills from the Poor House" written by the same poet.

Sixth. On information and belief, that prior to the 21st day of February, 1873, the said poet and author, Will Carleton, assigned said poems and literary properties "Farm Balads" which included "Over the Hills to the Poor House" and "Over the Hills from the Poor House," including all rights therein and the right to secure copyright therein, to Harper and Brother, a publisher of literary works and poems.

Seventh. Upon information and belief, that thereafter and on or about February 21st, 1873, the said Harper and Brother duly copyrighted said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" by publishing the same in a collection of other poems by the same author entitled "Farm Ballads" with the following notice of copyright on the first page of said work "Farm Ballads," to wit: "Copyrighted by Harper and Brother February 21st, 1873."

Eighth. On information and belief, that after the publication of said collection of poems entitled "Farm Ballads" containing the aforesaid poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" with such notice of copyright
4 as aforesaid. the said Harper and Brother promptly on the 21st day of February, 1873 deposited in the Office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition of the collection of poems entitled "Farm Ballads" containing the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" then published, accompanied by a claim of copyright, and paid to the said Register of Copyrights the fee required by law for such registration, and the said collection of poems entitled "Farm Ballads" including said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" was duly registered by said Register of Copyrights.

Ninth. On information and belief. that thereafter and until on or about February 21st, 1901 Harper and Brother, the proprietor of the said "Farm Ballads" published various editions of the said collection of poems entitled "Farm Ballads," which always contained the aforesaid poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and upon each copy of such editions of "Farm Ballads" so published there was inscribed on the first page thereof the copyright notice required by law in the following words: "Copyrighted by Harper and Brother February 21st, 1873."

Tenth. Upon information and belief, that within one
5 year before the expiration of the copyright aforesaid duly obtained by Harper and Brother of the collection of poems entitled "Farm Ballads," which included the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and on or about the 7th day of January, 1901 the said author Will Carleton, in accordance with the copyright law, duly filed an application with the Register of Copyrights of the United States for the renewal of said copyright, and on or about the 7th day of January,

1901 the said copyright of the collection of poems entitled "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" was duly renewed from February 21st, 1901 for the period of 14 years to and including on or about February 21st, 1915.

Eleventh. Upon information and belief, that from on or about February 21st, 1901 to on or about February 21st, 1915, the said collection of poems "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" were published in several editions, and that there was inscribed on the first page of each work and edition the following words: "Copyright 1873 by Harper and Brother Copyright 1901 by Will Carleton."

Twelfth. Upon information and belief, that the said author of the poems "Farm Ballads," Will Carleton, on or about the 18th day of December, 1912, departed this life leaving a Last Will and Testament in which he bequeathed all his property as sole legatee to one Norman E. Goodrich, a resident at that time of
6 the Borough of Brooklyn, City of New York, County of Kings and State of New York, and also appointed therein the said Norman E. Goodrich as sole executor. That the said Will of the said Will Carleton was duly probated in the Surrogates Court of the County of Kings, State of New York, on the 21st day of March, 1913, and that on or about said date Letters Testamentary were duly issued out of the said Court to the said Norman E. Goodrich as executor, and that the said Norman E. Goodrich duly qualified as such executor and duly acted as such.

Thirteenth. Upon information and belief, that within one year before the expiration of the renewal of the copyright duly obtained by the said Will Carleton, as set forth in paragraph "Tenth" hereof, the said Norman E. Goodrich, as executor and sole legatee of the estate of said Will Carleton, on or about January 21st, 1915 duly filed an application for the renewal of the said copyright with the Register of Copyrights, in accordance with the Copyright Law of the United States, and on or about the 21st day of January, 1915 the said copyright of the collection of poems entitled "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" was duly renewed from February 21st, 1915 for the period of 14 years to and including on or about February 21st, 1929.

7 Fourteenth. On information and belief, that thereafter and at all the times hereinafter mentioned the said collection of poems entitled "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" were published in several editions, and that there was inscribed on the first page of each work and edition the following words:

"Copyright 1873 by Harper and Brother.
Copyright 1901 by Will Carleton.
Copyrighted 1915 by Norman E. Goodrich."

Fifteenth. On information and belief, that the said Norman E. Goodrich departed this life on or about the 27th day of July, 1915 leaving a last will and testament in which he bequeathed all his property as sole legatee to one Alice L. Goodrich, widow of the deceased, a resident at that time of the Borough of Brooklyn, City of New York, County of Kings and State of New York, and also appointed therein the said Alice L. Goodrich as sole executrix. That the said Will of the said Norman E. Goodrich was duly probated in the Surrogates Court of the County of Kings, State of New York, on the 27th day of September, 1915, and that on or about the said date Letters Testamentary were duly issued out of the said Court to the said Alice L. Goodrich as executrix, and that the said Alice L. Goodrich duly qualified as such executrix and duly acted as such.

8 Sixteenth. That on or about the 26th day of October, 1920, the said Alice L. Goodrich, as executrix and sole legatee of the Estate of Norman E. Goodrich, deceased, for a valuable consideration, duly assigned to the plaintiff in writing the sole dramatic copyright of the said poems entitled "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and gave to plaintiff the exclusive right to dramatize the same for production on the stage throughout the world.

Seventh-. That the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" are and were capable of being dramatized and of dramatic representation, and the characters depicted in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House," by the words, expression and action as told in said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" unveil and tell a story and make and made it representation on the stage practical and effective.

Eighteenth. Upon information and belief, that prior to November 1st, 1920 the defendant Frederick M. Knowles, without the knowledge or consent of the plaintiff, or of the plaintiff's predecessors in title of the dramatic copyright of the aforesaid poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and in infringement of such dramatic copyright
9 and with full knowledge of the plaintiff's and its predecessors' rights in said poems and of such dramatic copyright, wrote a drama entitled "Over the Hills to the Poor House," which drama written by said defendant Frederick M. Knowles, with certain elaborations and modifications, exhibits the characters, scenes, incidents, situations and climaxes as contained in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and tells the story as told in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House."

Nineteenth. On information and belief, that thereafter on or about November 1st, 1920, the defendants Joseph Klein, Joseph Morris, Louis Baret, Corse Payton, Corse Payton Stock Co. and John Kaiser, and at other times subsequent thereto, and without the

knowledge or consent of the plaintiff or its predecessors in title and in infringement of the dramatic copyright of the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and with full knowledge of the plaintiff's rights in such work and of such copyright gave public performances and exhibitions for profit at the Amphion Theatre, in the Borough of Brooklyn, City of New York, of a drama entitled "Over the Hills to the Poor House" based upon the dramatic version written by the defendant Frederick M. Knowles as aforesaid, with the permission, assistance and participation of the defendant Knowles, and such public per-
10 formances given by said defendants portrayed the characters, scenes, incidents, situations and climaxes as contained in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and told the story as told by the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and the said defendants threatened to continue such infringing performances.

Twentieth. On information and belief, that in connection with the performances and exhibitions of the aforesaid drama "Over the Hills to the Poor House" given by said defendants, the said defendants caused to be issued many posters, handbills and circulars advertising the performances of the aforesaid drama "Over the Hills to the Poor House," and caused to be issued programs given to its patrons at said performances in said Amphion Theatre during each of said performances the following:

"The Corse Payton Stock Co. presents 'Over the Hills to the Poor House' Under the Direction of John Eiser."

Twenty-first. Upon information and belief, that the said public performances of the aforesaid drama "Over the Hills to the Poor House" by the said defendants at the said Amphion Theatre in the Borough of Brooklyn, City of New York, were given under their direction and for the entertainment of the patrons patronizing said theatre, and that the defendants have realized large profits
11 and income from such infringing performances, and the said defendants have never been authorized by the plaintiff or its predecessors in title to tell the story of the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" in a dramatic performance.

Twenty-second. That prior to the commencement of this suit your complainant duly notified the defendants of such infringement and requested said defendants to discontinue the same, but said defendants have knowingly and willfully refused to discontinue such infringing performances and knowingly and willfully continued to conduct said infringing performances, and, on information and belief, will continue the same in violation of the dramatic copyright owned by the plaintiff as aforesaid.

Twenty-third. That unless the defendants are restrained from continuing the said wrongful act above set forth the said defendant's wrongful and unlawful acts will irreparably injure the complainant and will damage it to such an extent that no damages recoverable by an action at law would afford it adequate relief.

Wherefore, complainant prays

(1) That the defendants and each of them, and their attorneys, agents and servants, and any and all persons acting under their direction, control permission or license, be enjoined and restrained during the pendency of this action and perpetually, from
12 publicly performing the drama "Over the Hills to the Poor House," and from causing or permitting the said drama to be publicly performed in the said defendants' premises, or in any place owned, controlled or conducted by said defendants and from aiding or abetting the public performance of said drama "Over the Hills to the Poor House" in any such place or otherwise.

(2) That the defendants and each of them render a full and true account of all moneys or profits derived by them, or either of them, from or by reason of the performance of the said drama "Over the Hills to the Poor House."

(3) That the complainant recover from the defendants the sum of Twenty-five thousand ($25,000) Dollars as and for its damages, and to that end the damages sustained by complainant by reason of such infringement be assessed and ascertained.

(4) That the defendants pay the costs of this action and that a reasonable attorneys' fee be allowed to the plaintiff.

(5) That the complainant have such other and further relief as may be just and equitable.

SAUL E. ROGERS,
Solicitor for the Complainant.

Office & P. O. Address: 55th St. & 10th Ave., Borough of Manhattan, New York City.

13 STATE OF NEW YORK,
County of New York, ss:

Jack G. Leo, being duly sworn, deposes and says: That he is the Vice President of the Fox Film Corporation, the complainant in the within action; that he has read the foregoing Bill of Comp-aint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by complainant is because complainant is a corporation and deponent an officer thereof, to wit: its Vice President.

JACK G. LEO.

Sworn to before me this 11th day of November, 1920.

——— ———.

14 *Answer of Defendant Frederick M. Knowles.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK CO., and JOHN KAISER, Defendants.

The defendant, Frederick M. Knowles, for his answer to the bill of complaint herein respectfully shows and alleges:

First. He admits the allegations contained in paragraphs marked "First" and "Fourth" of said bill of complaint.

Second. He has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs marked "Second," "Third," "Fifth," "Sixth," "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh," "Twelfth," "Thirteenth,"
15 "Fourteenth," "Fifteenth," "Sixteenth," "Twentieth," "Twenty-third" of said bill of complaint, and therefore denies the same.

Third. He denies each and every allegation contained in paragraphs marked, "Seventeenth," "Eighteenth," "Nineteenth," "Twenty-first," and "Twenty-second" of said bill of complaint.

Further answering said bill of complaint, defendant alleges:

Fourth. That about fourteen years ago, at the special instance and request of Corse Payton, he made certain elaborations to and upon a play then known as "Over the Hills to the Poorhouse."

Fifth. That when said elaborations were so made, different scenes of action, and different climaxes were introduced.

Further answering said bill of complaint, defendant alleges:

Sixth. That if a production was given by the defendants Corse Payton or Corse Payton Stock Co. or any of the defendant- herein, same was given without the knowledge and consent and against the will of this defendant, and this defendant did not authorize or give his permission to the defendants Corse Payton or Corse Payton Stock Co., or any of them, to print upon any programs any state-
16 ment that the play or production produced by them was adapted from Will Carleton's celebrated poem by Frederick M. Knowles, and that this defendant did not realize any profits by

reason of said production, and had no arrangements with any of the defendants, whereby he was to receive any moneys whatever by reason of this production.

Wherefore, defendant having duly answered all the matters set forth in the bill of complaint, prays this Honorable Court to enter its decree for the defendant by dismissing the bill of complaint with reasonable costs and charges in the matter wrongfully sustained.

Dated, New York, December 15th, 1920.

FREDERICK M. KNOWLES,
BICK, GODNICK & FREEDMAN,
Solicitors for Defendant Knowles.

17 *Verification.*

STATE OF NEW YORK,
County of Kings,
Borough of Brooklyn, ss:

Fred. M. Knowles, being duly sworn, deposes and says that he is one of the defendants in the within action; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

FREDERICK M. KNOWLES.

Sworn to before me this 15th day of December, 1920.
ETHAN R. KATZ,
Notary Public, Kings County.

18 *Answers of Joseph Klein, Joseph Morris, and Louis Baret.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Complainant,

vs.

FRED. M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, Corse Payton, Corse Payton Stock Co., and John Kaiser, Defendants.

The defendants Joseph Klein, Joseph Morris, and Louis Baret, for their answer to the bill of complaint of the plaintiff herein, respectfully show and allege:

First. They admit the allegations contained in paragraph marked "First."

Second. They admit that they are the lessees of, and managed, controlled and operated a certain place of public amusement or the-

atre known as the Amphion Theatre, located at Bedford Avenue and South 9th Street, in the Borough of Brooklyn, City of New York, in the Eastern District of New York, and that they are residents of the Borough of Brooklyn, City of New York, and County of New York, but deny each and every other allegation contained in paragraph "Second" of the complaint.

Third. They admit that the Corse Payton Stock Co. gave a dramatic and theatrical performance at the said Amphion Theatre, but deny each and every other allegation contained in paragraph marked "Third" of the bill of complaint.

Fourth. They have no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs marked "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth" and "Sixteenth" of the bill of complaint.

Fifth. That they deny the allegations contained in paragraphs marked "Seventeenth", "Eighteenth", "Nineteenth", "Twenty-first", "Twenty-second", and "Twenty-third" of said bill of complaint.

Sixth. They deny each and every allegation contained in paragraph marked "Twentieth", except they admit that they issued programs given to its patrons at said performance in said Amphion Theatre the following:

"The Corse Payton Stock — Presents, 'Over the Hills to the Poor House' under the direction of Joseph Klein."

Wherefore, defendants having duly answered all the matters set forth in the bill of complaint prays this Honorable Court to enter its decree for the defendants by dismissing the bill of complaint with reasonable costs and charges in the above matters wrongfully sustained.

Dated, New York, December 10th, 1920.

JOSEPH KLEIN,
LOUIS BARET.
JOSEPH MORRIS.

LOUIS CHARLES WILLS,
Solicitor for Defendants.

BICK, GODNICK & FREEDMAN,
Of Counsel.

215 Montague Street, Brooklyn, N. Y.

21 *Verification.*

STATE OF NEW YORK,
County of Kings,
Borough of Brooklyn, ss:

Joseph Klein, Joseph Morris, Louis Baret, being severally sworn, depose and say that they are three of the defendants in the within action; that they have read the foregoing answer and know the contents thereof; that the same is true to their own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters they believe it to be true.

JOSEPH KLEIN.
LOUIS BARET.
JOSEPH MORRIS.

Sworn to before me this 10th day of December, 1920.

FRED KAISER,
Notary Public, Kings County, N. Y.

22 *Answer of Defendant- Corse Payton and Corse Payton Stock Company.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Plaintiff,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, Corse Payton, Corse Payton Stock Co., and John Kaiser, Defendants.

The defendants, Corse Payton, and Corse Payton Stock Company, answering the complaint of the plaintiff.

First. Denies each and every allegation contained in paragraphs marked "Second" and "Third", except that the Corse Payton Stock Company conducts theatrical productions at the Amphion Theatre, in the Borough of Brooklyn, in the County of Kings.

Second. That the defendants, Corse Payton and Corse Payton Stock Co., have no knowledge or information thereof sufficient to form a belief as to the allegations contained in paragraphs marked "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Tenth",
23 "Eleventh", "Thirteenth", "Fourteenth", and "Sixteenth", except that the matters alleged to be of record in the various offices of the United States and the State of New York, there appears to be a similarity of names, as alleged in the said paragraphs of the complaint, and as to the identity of the persons, the defendants have no knowledge or information sufficient to form a belief thereof.

Third. Denies each and every allegation contained in paragraphs marked "Seventeenth", "Eighteenth" and "Nineteenth".

Fourth. Denies each and every allegation contained in paragraph marked "Twentieth", except that the said hand bills were distributed by order of the defendants.

Fifth. Denies each and every allegation contained in paragraphs marked "Twenty-first", Twenty-second" and "Twenty-third".

Wherefore, defendants, Corse Payton and Corse Payton Stock Co., demand judgment, dismissing the complaint.

JEROME C. JACKSON,
Solicitor and Attorney for Defendants
Corse Payton and Corse Payton Stock Co.

Office & P. O. Address, 1476 Broadway, Borough of Manhattan, City of New York.

24 STATE OF NEW YORK,
County of New York,
City of New York, ss:

Corse Payton, being duly sworn, deposes and says that he is one of the defendants herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason why this verification is made by deponent is that he is an officer, to wit, the — of the ——, which is a corporation, and is familiar with the facts and circumstances herein.

And the sources of deponent's information and the grounds of his belief as to all matters not therein stated upon — knowledge are as follows: ——.

CORSE PAYTON.

Sworn to before me this 22nd day of December, 1920.

[SEAL.] WILLIAM MEYERS,
Notary Public, N. Y. C.

25 *Notice of Motion by Defendant Frederick M. Knowles to Dismiss the Bill of Complaint.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Complainant,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS Baret, Corse Payton, Corse Payton Stock Co., and John Kaiser, Defendants.

SIR:

Please take notice, that upon the bill of complaint herein, I shall move this Court at a Stated Term thereof to be held for the hearing of Motions at the Post Office Building in the Borough of Brooklyn, City of New York on the 6th day of April, 1921, at 2 P. M. or as soon thereafter as counsel can be heard for an order dismissing the bill of complaint herein on the ground that there are not
26 sufficient facts contained therein to make out a cause of action and for such other and further relief as may be just and proper in the premises.

Dated, March 30th, 1921.

Yours etc.,

BICK, GODNISK & FREEDMAN,
Sols. for Deft. Knowles.

Office & P. O. Address, No. 215 Montague St., Borough of Brooklyn, City of New York.

To Saul E. Rogers, Sol. for complainant, 55th Street and 10th Avenue, New York City.

27 *Notice of Motion of Defendants Klein, Morris, and Baret to Dismiss the Bill of Complaint.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Complainant,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS Baret, Corse Payton, Corse Payton Stock Co., and John Kaiser, Defendants.

SIR:

Please take notice, that upon the bill of complaint herein, I shall move this Court at a Stated Term thereof to be held for the hearing of Motions at the Post Office Building in the Borough of Brooklyn,

City of New York on the 6th day of April, 1921, at 2 P. M. or as soon thereafter as counsel can be heard for an order dismissing the bill of complaint herein on the ground that there are not
28 sufficient facts contained therein to make out a cause of action and for such other and further relief as may be just and proper in the premises.

Dated, March 30th, 1921.

Yours etc.,

LOUIS C. WILLS,
Sol. for Defts. Klein, Morris and Baret.

Office & P. O. Address, No. 32 Court Street, Borough of Brooklyn, City of New York.

To Saul E. Rogers, Sol. for complainant, 55th Street and 10th Avenue, New York City.

29 *Opinion of Hon. Thomas I. Chatfield, D. J.*

United States District Court, Eastern District of New York.

THE FOX FILM CORPORATION

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK CO., and JOHN KAISER.

June 28, 1921.

Saul E. Rogers, solicitor for complainant; Saul E. Rogers and Percy Heiliger, of counsel;

Bick, Godnick & Freedman, solicitors for defendants; Fred Francis Weiss and Louis R. Bick, of counsel.

CHATFIELD, *J.:*

The defendants move for judgment under Equity Rule 29 dismissing a bill of complaint charging infringement of copyright. This application is exactly similar to one made in the case of the Fox Film Corporation against Frederick M. Knowles and others,
30 in the Southern District of New York, in which the bill was dismissed upon a decision filed May 18, 1921, by Knox, District Judge. As the principles of law involved have been recently passed upon in the case of Danks v. Gordon, decided by the Circuit Court of Appeals, upon the 2nd day of March 1921, and the case of Silverman v. Sunrise Pictures Corporation decided by the Circuit Court of Appeals on the 11th day of May, 1921, it is unnecessary to repeat the various propositions discussed and determined in those decisions.

But three points are presented on this application. In the first place, it is suggested that the plaintiff has failed to allege a cause of

action because it has neglected to stated specifically that an executor recording a copyright and claiming the copyright as legatee, took such action in the absence of any living widow, children or next of kin of the author.

If we were considering the matter of jurisdiction in the District Court, as was the case in Danks v. Gordon, supra, allegations of fact rather than conclusions of law would be necessary so as to make out prima facie grounds for the exercise of jurisdiction by this court. But in this case jurisdiction is undoubted. An allegation that action was had by an executor plainly imports a will, thus excluding next of kin under the statute. An allegation that the copyright was duly obtained, when admitted for the purpose of this motion, makes it unnecessary to specifically allege the non-existence of other persons entitled.

31 In order to avoid confusion, as was held by Judge Knox in the case in the Southern District, amendment, could be had, but is unnecessary as the present motion cannot be supported on any such ground.

The real point in the case is the question whether Will Carleton, the author of the copyrighted poems, who had assigned his interest, including authority to copyright, to Harper & Brothers, many years previous, could, by will, at the time of his decease in 1913, transfer to his executor or legatee under the will, the capacity to obtain, under the provisions of the copyright statute, any interest by filing a notice of renewal on Jany. 21, 1915, just one month prior to the expiration of the previous copyright.

The cases cited and also Paige v. Banks, 80 U. S. 608 (decided with respect to the language of the previous statute of May 31, 1790) established the proposition that no assignment of copyright or of right to copyright, can anticipate or assign away the right of renewal which is conferred upon the author, widow, children, next of kin, or executor by the Statute. In other words, the property right obtained by the filing of a copyright, is the power to prevent copying or use of the material during the period provided for by statute. Neither the author nor his assignee possess any rights or powers which can be transferred in such a way as to run beyond that period. When the renewal of the copyright is sought, a new property right is created and a new power to prevent copying given to the persons entitled, not in any way dependent upon the previous

32 bestowal of a similar authority.

When there are no widow, children or next of kin and the right of renewal vests in an executor, the right must become property which is a part of the estate. Upon the happening of the condition subsequent, the estate thus gains the renewal of the copyright, and the person then entitled to receive the estate or that part of it which includes the renewed copyright, will receive the benefit at the hands of the executor. No formal transfer by the executor is necessary, as evidently the executor can hold this property right only subject to accounting for and turning over the estate.

A third objection is raised in the present case because notice of copyright, after renewal by the executor was printed as "Copyright

1915, by Norman E. Goodrich." Section 18 of the Copyright Law of 1909, which was in force at that time did not require that the name of the person entitled to file the copyright should be printed, and this notice would seem to be sufficient under the statutes, if on Janv. 21, 1915, the filing of a renewal of copyright by the executor of Will Carleton, the author of the poems in question, secured the copyright to the estate. The executor was also sole legatee, and if he obtained the rights to this renewal, these rights would upon his decease pass under his own will. The plaintiff in this case claims these rights by assignment from this legatee.

33 The conclusion of the court in the case of Fox Film Corporation v. Knowles and others, in the Southern District, that the executor and legatee of Will Carleton deceased, obtained no valid copyright by filing the notice of renewal, is based upon the statement in the Silverman case, supra, as follows: "We construe the section as vesting the right in, or imposing the duty on executors, only when the power of privilege of obtaining renewal was existing in the testator-author at the moment of decease."

It is apparent that in 1915, the decedent, Will Carleton, had no power to make any disposition with respect to the copyright then in existence. But the point which must now be decided is whether the right to renew the copyright was lost to his estate, and passed to his next of kin directly, if the decedent left him surviving no widow or children, who were living during the last year before the expiration of the earlier copyright, when the decedent's death occurred before the beginning of this year.

In Danks v. Gordon, supra, and Silverman v. Sunrise Pictures Corporation, supra, it was held that an administrator, as such, obtained no right of renewal of a copyright. It evidently follows that next of kin may take directly, but that their rights do not pass through the hands of the administrator. That is, that their rights are not a part of the estate of the decedent. If the right of renewal is not a part of the estate of the decedent, then it would not pass by will. The only purpose of including the word "executor" in the statute must

34 then have been to cover the possible situation presented by the death of an author before renewing a copyright but within the year during which a copyright might be renewed, where no widow or children were living at the time, and where the decedent, by living until his power of renewal had accrued, obtained thereby a property right which was recognizable as part of his estate, as soon as the privilege was exercised.

On this view of the statute as interpreted by the cases, the author, Will Carleton, at his decease had no rights which he could dispose of in the old copyright which he had assigned. He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived. The power to renewal apparently vested in his next of kin and was not exercised, and no valid copyright for the renewal period now exists.

The motion must therefore be granted and the complaint dismissed.

35 *Affidavit of Fred Francis Weiss.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK CO., and JOHN KISER, Defendants.

STATE OF NEW YORK,
County of Kings, ss:

Fred Francis Weiss, being duly sworn, deposes and says: That he is associated with the firm of Bick, Godnick & Freedman, solicitors for the defendant Frederick M. Knowles, and of counsel for the defendants, Joseph Klein, Joseph Morris and Louis Baret, who appeared in this action by Louis Charles Wills, Esq., their attorney.

This action was brought by the plaintiff, Fox Film Corporation, to restrain the defendants from infringing upon their alleged
36 copyright to the film known as "Over the Hills to the Poorhouse," which was based upon Will Carleton's poems known as "Over the Hills to the Poorhouse" and "Over the Hills from the Poorhouse," and also to recover damages in the sum of Twenty-five thousand ($25,000) Dollars, together with the costs, and a reasonable attorney's fee.

The complaint was served upon the defendants on or about the 13th day of November, 1920. The defendant Joseph Klein, Joseph Morris and Louis Baret filed a notice of appearance by Louis Charles Wills on or about the 3rd day of December, 1920.

Thereafter, Messrs. Bick, Godnick & Freedman, were retained by the defendants aforementioned, as counsel. On the 11th day of December, 1920, the defendant Frederick M. Knowles, appeared by Messrs. Bick, Godnick & Freedman. It required a careful examination of the complaint to interpose a proper answer thereto, which necessitated asking for an extension of time to answer, which was granted to the 13th day of December, 1920.

On or about the 10th day of December, 1920, issue was joined by the services of answers on behalf of the defendants above mentioned.

That this case then was added to the calendar of this Court for trial. That in March, 1921, I started to prepare this case for trial, nd after a careful examination of the complaint and the answer, came
37 to the conclusion that the bill of complaint failed to state facts sufficient to constitute a cause of action, and therefore, on the 30th day of March, 1921, made a motion to dismiss the complaint under rule 29 of the Equity Rules of this Court.

This motion came on to be heard before the Hon. Thomas I. Chatfield on the 6th day of April, 1921, and was argued at length and briefs were submitted.

That on the 6th day of April, 1921, this case also appeared for trial before Hon. Edwin L. Garvin, and was adjourned pending the determination of the motion.

The matter again appeared on the calendar, I believe, on two occasions, and was adjourned on both these occasions pending the determination by this Court of the motion to dismiss.

That in preparing the memorandum, Mr. Louis R. Bick and myself, spent a number of days in looking up the law with reference to the point involved, and spent another two days in preparing the brief. In this brief a number of interesting and novel points were discussed. It required, in preparing this memorandum, the examination of various text books, and examination of many cases with a view of differentiating the same, and the examination of the several copyright statutes, as well as the opinion of the Attorney General with reference to the copyright statute. After the submis-
38 sion of the briefs, Judge Chatfield rendered a decision dismissing the bill of complaint.

A decree has been prepared, which is now before this Court for signature. The defendants Klein, Morris and Baret are the owners of a theatre, where the alleged infringement took place. Frederick M. Knowles is charged in the complaint with having assisted in the infringement of rewriting several parts of the poems.

When we were retained by the defendants, I immediately got in communication with Saul E. Rogers, Esq., the attorney for the complainant, and advised him that our clients did not intentionally infringe, and that it would be expensive to them to litigate the matter, and that Knowles should not have been made a party. I offered, on behalf of the defendants, to enter into a consent decree, and to the issuance of an injunction, but that no costs or damages should be demanded by him of our clients. Mr. Rogers refused to discontinue this suit against Mr. Knowles, nor to accept the consent decree without the payment of substantial damages. As a matter of fact, he insisted upon every penny of profits that were made.

He told me that he had the house clocked, and knew to the penny, just how much moneys we took in at the box office. Under the circumstances, I told Mr. Rogers that we would have to litigate the matter and question the validity of his copyright.

We believe that this Court should take these facts into consideration on the question of the amount of the counsel fee to be
39 allowed. Our adversary has submitted a memorandum to this Court, stating that the case was decided on a point not raised by us, but was decided upon a decision rendered by the Circuit Court of Appeals. While this is true, we contend, however, that it is immaterial on what point the Court dismissed the bill, since the matter came up on our motion, and if the motion had not been made, the bill would not have been dismissed.

We presented the same argument to Judge Knox in the Southern District, where the same contentions were made by the plaintiff, and Judge Knox said that the complainant should pay a reasonable attorneys' fee in view of that fact that the defendants had offered to

the complainants a consent decree, and that in refusing to accept the consent decree, it compelled the defendants to litigate and make defense. The Judge also stated that Knowles was merely a nominal defendant, and that the complainant's argument, instead of mitigating, aggravated the matter.

We therefore respectfully ask this Court to allow the defendants herein a substantial counsel fee in view of all the facts and particularly in view of the services rendered in bringing success to the defendants.

Judge Knox in the Southern District allowed us a counsel fee of One hundred and fifty ($150) Dollars. We appeared in that action merely for the defendant Knowles. In this action we ap-
40 peared for all of the defendants with the exception of Corse Payton, Corse Payton Stock Company and John Kiser.

FRED FRANCIS WEISS.

Sworn to before me this 13th day of July, 1921.

RHODA MENDEL,
Notary Public, Kings County.

Kings Co. Clerk's No. 250.
Kings Co. Register's No. 2266.
Certificate filed in New York County.
Clerk's No. 704; Register's No. 2532.
Term expires March 30th, 1922.

41 *Final Decree.*

At a Stated Term of the United States District Court Held in and for the Eastern District of New York, at the Post Office Building, in the Borough of Brooklyn, City of New York, on the 18th Day of July, 1921.

Present: Hon. Thomas I. Chatfield, District Judge.

FOX FILM CORPORATION, Complainant,

vs.

FRED M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, Corse Payton, Corse Payton Stock Co., and John Kaiser, Defendants.

The defendants having made a motion to dismiss the plaintiff's bill of complaint, on the ground that it failed to state facts sufficient to constitute a cause of action, and after hearing counsel for the respective parties hereto, and due deliberation having been had, it is

On motion of Bick, Godnick & Freedman, solicitors for the
42 defendant Frederick M. Knowles, and Louis C. Wills, solicitor for the defendants Klein, Morris and Baret,

Ordered, adjudged and decreed, that the complainant, Fox Film Corporation, has no valid right to the poem entitled "Over the Hills to the Poorhouse" and to the poem entitled "Over the Hills from the

Poorhouse," nor has it the exclusive right to dramatize the said poems, or either of them, and it is further

Ordered, adjudged and decreed, that Fox Film Corporation, the complainant herein, has no valid title to any copyright to the poems entitled "Over the Hills to the Poorhouse" and "Over the Hills from the Poorhouse" and it is further

Ordered, adjudged and decreed, that the bill of complaint herein be, and the same hereby is dismissed, with costs, and it is further

Ordered, adjudged and decreed, that the defendants do recover from the complainant, Fox Film Corporation, the sum of $23.40 as costs, to be taxed by the Clerk of this Court, and $100 as and for a reasonable attorneys' fees, making a total sum of $123.40 as costs, and that the defendants have execution against the Fox Film Corporation therefor.

THOMAS I. CHATFIELD,
U. S. D. J.

43 *Petition for Appeal.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Complainant,

against

FRED M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, Corse Payton, Corse Payton Stock Co., and John Kaiser, Defendants.

To the Honorable Thomas I. Chatfield, District Judge:

The above named complainant Fox Film Corporation, feeling aggrieved by the decree made and entered in the above entitled action on the 18th day of July, 1921 dismissing the bill of complaint herein with costs and granting to the defendants' attorneys an allowance of One hundred ($100.00) dollars, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in the assignment of errors filed herewith,

44 and prays that this appeal be allowed; and that citations be issued as provided by law; and that a transcript of the record, proceedings and documents upon which the decree was based duly authenticated be sent to the United States Circuit Court of Appeals for the Second Circuit under the rules in said court in such cases made and provided and your petitioner further prays that the proper order relating to the required security to be required of it be made.

Dated August 15th, 1921.

FOX FILM CORPORATION,
By JACK G. LEO, *Vice-Pres.*
SAUL E. ROGERS, ESQ.,
Solicitor for Complainant.

Office & P. O. Address, 840 Tenth Avenue, Borough of Manhattan, New York City.

45 *Order Allowing Appeal.*

Appeal allowed upon giving bond as required by law for the sum of Five hundred Dollars, the same to act as a supersedeas bond to said execution pending appeal, and also as a bond for costs and damages on appeal.

Dated New York, Sept. 10th, 1921.

EDWIN L. GARVIN,
U. S. D. J.

46 *Assignment of Errors.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Complainant,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK CO., and JOHN KAISER, Defendants.

Now comes the complainant in the above entitled action and files the following assignment of errors, which it will require upon its prosecution of the appeal in the above entitled cause from the decree made by this honorable Court on the 18th day of July:

1. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the ground that it did not allege facts sufficient to constitute a cause of action for infringement of the dramatic copyright of two poems entitled "Over the Hill to the Poor House" and "Over the Hill from the Poor House" written by Will Carleton, and which were published in a collection of other poems entitled "Farm Ballads."

47 2. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the ground that Norman E. Goodrich, executor and sole legatee of the author Will Carleton, and the complainant's predecessor in title, did not obtain a second valid renewal copyright of the poems "Over the Hill to the Poor House" and "Over the Hill from the Poor House" which renewal copyright purported to extend from the year 1915 to and including the year 1929.

3. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the ground that Norman E. Goodrich, executor and sole legatee of the author Will Carleton, and the complainant's predecessor in title, did not obtain a second valid renewal copyright of a collection of poems entitled "Farm Ballads" which renewal copyright purported to extend from the year 1915 to and including the year 1929.

4. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the

ground that after the decease of Will Carleton the author of "Over the Hill to the Poor House" and "Over the Hill from the Poor House" in 1912, he could not give or devise by will to any legatee or distributee whether same were his executor or any other persons, the right to obtain and receive the benefit of a further renewal copyright, although said author and owner of the first renewal
48 copyright left him surviving no widow, children or heirs.

5. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the ground that after the decease of Will Carleton the author of the collection of poems entitled "Farm Ballads" in 1912, he could not give or devise by will to any legatee or distributee whether same were his executor or any other persons, the right to obtain and receive the benefit of a further renewal copyright although said author and owner of the first renewal copyright left him surviving no widow, children or heirs.

6. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the ground that although the author Will Carleton of the poems "Over the Hill to the Poor House" and "Over the Hill from the Poor House" and holder of the first renewal copyright which expired in 1915, left him surviving no widow, children or heirs, his executor Norman E. Goodrich, before the expiration of said renewal copyright or at any other time, could not make a valid application for a further renewal of said copyright or in any manner obtain by reason of such application, a valid renewal of said copyright which would inure to the benefit of the legatees or distributees under the will of said author, whether same were the executor or any other persons, unless Will Carleton, the said author and holder of the first renewal copy-
49 right died in 1914, one year before the expiration of the first renewal copyright obtained by him and which first renewal copyright expired in 1915.

7. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the ground that although the author Will Carleton of the collection of poems entitled "Farm Ballads" and holder of the first renewal copyright which expired in 1915, left him surviving no widow, children or heirs, his executor Norman E. Goodrich, before the expiration of said renewal copyright or at any other time, could not make a valid application for a further renewal of said copyright or in any manner obtain by reason of such application, a valid renewal of said copyright which would inure to the benefit of the legatees or distributees under the will of said author, whether same were the executor or any other persons, unless Will Carleton, the said author and holder of the first renewal copyright died in 1914, one year before the expiration of the first renewal copyright obtained by him and which first renewal copyright expired in 1915.

8. That the United States District Court for the Eastern District of New York erred in dismissing the bill of complaint on the

ground that even if an author dies leaving him surviving no widow
children or heirs, an executor cannot make a valid application for
renewal copyright or obtain by reason of said application
50 valid renewal copyright for the benefit of the legatees or di
tributees unless the author dies within one year from the e
piration of his copyright.

9. That the United States District Court for the Eastern Distri
of New York erred in dismissing the bill of complaint on the grou
that even if the author dies leaving no widow, chilren or heirs, b
leaves a will bequeathing all his property to a sole legatee who
also an executor named under said will, such executor cannot und
the copyright law make a valid application for a further renew
copyright or obtain the benefit of same unless said author dies with
a year preceding the expiration of said first renewal copyright a
in such event the next of kin, if any, would have a prior rig
to the said executor to make a valid application for a further renew
copyright and obtain the benefits therefrom.

Whereas the appellant prays that the said decree be reversed a
that the said District Court for the Eastern District of New York
ordered to enter a decree reversing the decision of the lower Court
said case.

SAUL E. ROGERS,
Attorney for Appellant.

Office & P. O. Address, 840 Tenth Ave., Borough of Manhatt
New York City.

51 *Citation.*

United States District Court, Eastern District of New York.

Fox Film Corporation, Complainant-Appellant,

against

Corse Payton, Corse Payton Stock Company, John Kais
Defendants, and Frederick M. Knowles, Joseph S. Klein, Jose
Morris, and Louis Baret, Appellee'-Defendants.

United States of America, *ss:*

To Frederick M. Knowles, Joseph S. Klein, Joseph Morris, a
Louis Baret, Greeting:

You are hereby cited and admonished to be and appear at a sessi
of the United States Circuit Court of Appeals for the Second Circ
to be held at the United States Court House at Post Office Buildi
Borough of Manhattan, New York City, N. Y. on the 10th day
October, 1921, pursuant to an appeal filed in the Clerk's of
52 of the District Court of the United States for the Eastern D
trict of New York, wherein Fox Film Corporation is co
plainant-appellant and you are appellees, to show cause, if any th

be, why the decree entered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edwin L. Garvin, Judge of the District Court of the United States for the Eastern District of New York, this 10th day of September, in the year of our Lord one thousand nine hundred and twenty-one, and of the independence of the United States, the 146th.

EDWIN L. GARVIN,
United States District Judge.

53 *Bond for Damages and Costs.*

District Court of the United States of America for the Eastern District of New York, in the Second Circuit.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, et al.

Know all men by these presents: That we Fox Film Corporation, as principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, County and State of New York, as surety, are held and firmly bound unto the above named Frederick M. Knowles, Joseph Klein, Joseph Morris, Louis Baret, et al., in the sum of Five hundred ($500.00) dollars, to be paid to the said Frederick M. Knowles, Joseph Klein, Joseph Morris, Louis Baret, et al., for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

54 Sealed with our seals and dated the 30th day of August, 1921.

Whereas, the above named Fox Film Corporation has prosecuted its appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the decree dated the 18th day of July, 1921, rendered in the above entitled suit in the District Court of the United States for the Eastern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named Fox Film Corporation shall prosecute its appeal to effect and answer all damages and costs if it fail to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FOX FILM CORPORATION. [L. S.]
P. J. JACK G. LEO. [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By S. FRANK HEDGES, *Attorney-in-fact.*

Attest:
WILLIAM H. ESTWICK,
Attorney-in-fact.

55 STATE OF NEW YORK,
County of New York, ss:

On this 30th day of August, 1921 before me personally came S. Frank Hedges known to me to be the Attorney-in-fact of the United States Fidelty and Guaranty Company, the corporation described in and which executed the annexed bond of Fox Film Corporation as surety thereon, who being by me duly sworn, deposes and says, that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company; and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Fox Film Corporation is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be the Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is in the genuine handwriting of said William H. Estwick and was thereto subscribed by order and
56 authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unincumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 30th day of August, 1921.

C. B. BRADBURY,
Notary Public, Westchester County.

Certificates filed in the following counties, New York, Clerk's No 701.

57 STATE, CITY AND COUNTY OF NEW YORK, *ss:*

On this 31st day of August, 1921, before me came Jack G. Leo, to me known, who being by me duly sworn, did depose and say that he resides in the Borough of Bronx, City of New York; that he is the vice-president of the Fox Film Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such

corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

GEORGE BLECH,
Commissioner of Deeds, City of New York.

N. Y. Co., Clerk No. 21140.
Kings County 1108.

58 *Stipulation.*

United States District Court, Eastern District of New York.

FOX FILM CORPORATION, Complainant-Appellant,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, and Louis Baret, Defendants-Appellees, and Corse Payton, Corse Payton Stock Co., and John Kaiser, Defendants.

It is hereby stipulated and agreed that the foregoing is a true copy of the transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, October 31, 1921.

SAUL E. ROGERS,
Attorney for Complainant-Appellant.
BICK, GODNICK & FREEDMAN,
Attorneys for Defendant Knowles.
LOUIS C. WILLS,
Attorney for Defendants Klein, Morris & Baret.

59 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

FOX FILM CORPORATION, Complainant-Appellant,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS Baret, Corse Payton, Corse Payton Stock Company, and Joseph Kaiser, Defendants-Appellees.

I, Percy G. B. Gilkes, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby Certify that the foregoing is a correct copy of the transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of Brooklyn, in the Eastern District

of New York, this 31st day of October, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] PERCY G. B. GILKES,
Clerk.

60 *Decision C. C. A.*

United States Circuit Court of Appeals for the Second Circuit.

FOX FILM CORPORATION, Complainant-Appellant,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the First Name "William" Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff), Harry Myers and Joseph S. Klein, Defendants-Appellees.

FOX FILM CORPORATION, Complainant-Appellant,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS Baret, Corse Payton, Corse Payton Stock Company, and John Kaiser, Defendants-Appellees.

Before Hough, Manton, Mayer, JJ.

Saul E. Rogers, for Appellant.
Fred F. Weiss, for Appellee-.

Per Curiam:

Decrees affirmed on authority of Silverman vs. Sunrise, etc. Co., 273 Fed., 909.

61 *Order for Mandate.*

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit held at the court-rooms, in the Post Office building, in the City of New York, on the 2nd day of February, one thousand nine hundred and twenty-two.

Present:

Hon. Charles M. Hough,
Hon. Martin T. Manton,
Hon. Julius M. Mayer,
Circuit Judges.

FOX FILM CORPORATION, Complainant-Appellant,

v.

FREDERICK M. KNOWLES et al., Defendants-Appellees.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

62 On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H.
M. T. M.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Fox Film Corpn. v. F. M. Knowles, et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 2, 1922. William Parkin, Clerk.

63 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 62 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Fox Film Corporation, Complainant-Appellant, against Frederick M. Knowles, et al., Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of February in the year of our Lord One Thousand Nine Hundred and Twenty-two and of the Independence of the said United States the One Hundred and Forty-sixth.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

64 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Fox Film Corporation is appellant, and Frederick M. Knowles, Joseph Klein, Joseph Morris, Louis Baret, Corse Payton, Corse Payton Stock Company, and John Kaiser, are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Eastern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
65 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

65½ [Endorsed:] File No. 28,780. Supreme Court of the United States, October Term, 1921. No. 825. Fox Film Corporation vs. Frederick M. Knowles et al. Writ of Certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 5, 1922. William Parkin, Clerk.

66 In the Supreme Court of the United States, October Term, 1921.

FOX FILM CORPORATION, Petitioner,

v.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH NORRIS, LOUIS Baret, Corse Payton, Corse Payton Stock Company, and John Kaiser, Respondents.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of

Appeals for the Second Circuit to the writ of certiorari granted therein.

SAUL E. ROGERS,
Counsel for Petitioner.
LOUIS R. BICK,
Counsel for Respondents.

67 & 68 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York May 6th, 1922.

[Seal of United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

69 & 70 [Endorsed:] 825—28780. United States Circuit Court of Appeals, Second Circuit. Fox Film Corporation v. F. M. Knowles et al. Return to Certiorari. 1.70.

71 [Endorsed:] File No. 28,780. Supreme Court U. S., October Term, 1921. Term No. 825. Fox Film Corporation, Petitioner, vs. Frederick M. Knowles et al. Writ of certiorari and return. Filed May 11, 1922.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 311.

FOX FILM CORPORATION, PETITIONER,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, &c.; HARRY MEYERS, AND JOSEPH S. KLEIN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 24, 1923.

CERTIORARI AND RETURN FILED MAY 11, 1923.

(28,781)

(28,781)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 311.

FOX FILM CORPORATION, PETITIONER,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, &c.; HARRY MEYERS, AND JOSEPH S. KLEIN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print.
Record from the district court of the United States for the southern district of New York	1	1
Bill of complaint	1	1
Answer of defendant Knowles	15	7
Answers of McWatters, Meyers, and Klein	19	8
Notice of motion by defendant Knowles to dismiss complaint	21	9
Opinion, Knox, J	23	10
Decree	30	13
Notice of motion to amend decree	32	14
Affidavit of Fred Francis Weiss in support of motion to amend decree	34	15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 16, 1922.

	Original.	Print.
Affidavit of Percy Heiliger in opposition to motion to amend decree	37	16
Affidavit of Fred Francis Weiss	41	18
Opinion, Knox, J., on motion to amend decree	43	19
Final amended decree	44	19
Petition for appeal	48	21
Order allowing appeal and fixing bond	50	21
Assignment of errors	51	22
Bond on appeal	56	24
Citation	61	27
Stipulation as to transcript	63	27
Clerk's certificate	64	28
Proceedings in circuit court of appeals	65	29
Opinion, *per curiam*	65	29
Order for mandate	66	29
Clerk's certificate	68	30
Writ of certiorari and return	69	30

1 *Bill of Complaint.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Complainant,

against

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the First Name, "William," Being Fictitious, Real Name of This Respondent Unknown to Plaintiff), Harry Myers, and Joseph S. Klein, Respondents.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The complainant complaining of the defendant, alleges:

First. That at all the times hereinafter mentioned the complainant was and still is a corporation duly organized and existing
2 under and by virtue of the Laws of the State of New York, and having its principal place of business in the Borough of Manhattan, City of New York, in the Southern District of New York, and is a citizen of the United States.

Second. Upon information and belief, that at all the times hereinafter mentioned the defendants Joseph S. Klein, "William" O. McWatters and Harry Myers were the lessees of and managed, controlled and operated a certain place of public entertainment or theatre known as "The 14th Street Theatre" located at or near the Northwest corner of Sixth Avenue and 14th Street, in the Borough of Manhattan, City of New York, in the Southern District of New York, and, on information and belief, that the said defendants are residents of the Borough of Manhattan, City and County of New York.

Third. On information and belief, that at all the times hereinafter mentioned the defendant Frederick M. Knowles was and still is a resident of the County of Queens, in the City and State of New York.

Fourth. On information and belief, that prior to February 21st, 1873 one Will Carleton, a citizen of the United States, invented, originated, created and wrote a series or collection of poems entitled
"Farm Ballads," which contained two certain poems entitled
3 "Over the Hills to the Poor House" and "Over the Hills from the Poor House" written by the same poet.

Fifth. On information and belief, that prior to the 21st day of February, 1873, the said poet and author, Will Carleton, assigned said poems and literary properties "Farm Ballads" which included "Over the Hills to the Poor House" and "Over the Hills from the

Poor House," included all rights therein, and the right to secure copyright therein, to Harper and Brother, a publisher of literary works and poems.

Sixth. Upon information and belief, that thereafter and on or about February 21st, 1873, the said Harper and Brother duly copyrighted said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" by publishing the same in a collection of other poems by the same author entitled "Farm Ballads" with the following notice of copyright on the first page of said work "Farm Ballads" to wit: "Copyrighted by Harper and Brother February 21st, 1873."

Seventh. On information and belief, that after the publication of said collection of poems entitled "Farm Ballads" containing the aforesaid poems "Over the Hills to the Poorhouse" and "Over the Hills from the Poor House" with such notice of copyright as aforesaid, the said Harper and Brother promptly on the 21st day of February, 1873 deposited in the office of the Register of Copyrights, Washington, District of Columbia, two com-
4 plete copies of the best edition of the collection of poems entitled "Farm Ballads" containing the poems "Over the Hills to the Poor House," and "Over the Hills from the Poor House" then published, accompanied by a claim of copyright, and paid to the said Register of Copyrights the fee required by law for such registration, and the said collection of poems entitled "Farm Ballads" including said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" was duly registered by said Register of Copyrights.

Eighth. On information and belief, that thereafter and until on or about February 21st, 1901 Harper and Brother, the proprietors of the said "Farm Ballads" published various editions of the said collection of poems entitled "Farm Ballads," which always contained the aforesaid poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and upon each copy of such editions of "Farm Ballads" so published there was inscribed on the first page thereof the copyright notice required by law in the following words: "Copyrighted by Harper and Brother February 21st 1873."

Ninth. Upon information and belief, that within one year before the expiration of the copyright aforesaid duly obtained by Harper and Brother of the collection of poems entitled "Farm Ballads," which included the poems "Over the Hills to the Poor House
5 and "Over the Hills from the Poor House" and on or about the 7th day of January 1901 the said author Will Carleton in accordance with the Copyright Law, duly filed an application with the Register of Copyrights of the United States for the renewal of said copyright, and on or about the 7th day of January, 1901 the said copyright of the collection of poems entitled "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over

the Hills from the Poor House" was duly renewed from February 21st, 1901, for the period of 14 years to and including on or about February 21st, 1915.

Tenth. Upon information and belief, that from on or about February 21st, 1901, to on or about February 21st, 1915, the said collection of poems "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" were published in several editions, and that there was inscribed on the first page of each work and edition the following words: "Copyright 1873 by Harper and Brother Copyright 1901 by Will Carleton."

Eleventh. Upon information and belief, that the said author of the poems "Farm Ballads," Will Carleton, on or about the 18th day of December, 1912, departed this life leaving a Last Will and Testament in which he bequeathed all his property as sole legatee to one
6 Norman E. Goodrich, a resident at that time of the Borough of Brooklyn, City of New York, County of Kings and State of New York, and also appointed therein the said Norman E. Goodrich as sole executor. That the said Will of the said Will Carleton was duly probated in the Surrogates Court of the County of Kings, State of New York, on the 21st day of March, 1913, and that on or about said date Letters Testamentary were duly issued out of the said Court to the said Norman E. Goodrich as executor, and that the said Norman E. Goodrich duly qualified as such executor and duly acted as such.

Twelfth. Upon information and belief, that within one year before the expiration of the renewal of the copyright duly obtained by the said Will Carleton, as set forth in paragraph "Ninth" hereof, the said Norman E. Goodrich, as executor and sole legatee of the estate of said Will Carleton, on or about January 21st, 1915 duly filed an application for the renewal of the said copyright with the Register of Copyrights, in accordance with the Copyright Law of the United States, and on or about the 21st day of January, 1915 the said copyright of the collection of poems entitled "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" was duly renewed from February 21st, 1915 for the period of 14 years to and including on or about February 21st, 1929.

Thirteenth. On information and belief, that thereafter and at all the times hereinafter mentioned the said collection of poems
7 entitled "Farm Ballads" including the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" were published in several editions, and that there was inscribed on the first page of each work and edition the following words:

"Copyright 1873 by Harper and Brother.
Copyright 1901 by Will Carleton.
Copyright 1915 by Norman E. Goodrich."

Fourteenth. On information and belief, that the said Norman E. Goodrich departed this life on or about the 27th day of July, 1915, leaving a Last Will and Testament in which he bequeathed all his property as sole legatee to one Alice L. Goodrich, widow of the deceased, a resident at that time of the Borough of Brooklyn, City of New York, County of Kings and State of New York, and also appointed therein the said Alice L. Goodrich as sole executrix. That the said Will of the said Norman E. Goodrich was duly probated in the Surrogates Court of the County of Kings, State of New York, on the 27th day of September, 1915, and that on or about the said date Letters Testamentary were duly issued out of the said Court to the said Alice L. Goodrich as executrix, and that the said Alice L. Goodrich duly qualified as such executrix and duly acted as such.

8 Fifteenth. That on or about the 26th day of October, 1920, the said Alice L. Goodrich, as executrix and sole legatee of the Estate of Norman E. Goodrich, deceased, for a valuable consideration, duly assigned to the plaintiff in writing the sole dramatic copyright of the said poems entitled "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and gave to the plaintiff the exclusive right to dramatize the same for production on the stage throughout the world.

Sixteenth. That the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" are and were capable of being dramatized and of dramatic representation, and the characters depicted in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House," by the words, expression and action as told in said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" unveil and tell a story and make and made its representation on the stage practical and effective.

Seventeenth. Upon information and belief, that prior to October 25th, 1920 the defendant Frederick M. Knowles, without the knowledge or consent of the plaintiff, or of the plaintiff's predecessors in title of the dramatic copyright of the aforesaid poems "Over the Hills to the Poor House," and "Over the Hills from the Poor House," and in infringement of such dramatic copyright and with full
9 knowledge of the plaintiff's and its predecessors' rights in said poems and of such dramatic copyright, wrote a drama entitled "Over the Hills to the Poor House," which drama written by said defendant Frederick M. Knowles, with certain elaborations and modifications, exhibits the characters, scenes, incidents, situations and climaxes as contained in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and tells the story as told in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House."

Eighteenth. On information and belief, that thereafter on or about October 25th, 1920, the defendants Klein, McWatters and Myers, and at other times subsequent thereto, and without the knowledge or consent of the plaintiff or its predecessors in title and in infringement of the dramatic copyright of the poems "Over the Hills to the Poor

House" and "Over the Hills from the Poor House" and with full knowledge of the plaintiff's rights in such work and of such copyright, gave public performances and exhibitions for profit at the 14th Street Theatre, in the Borough of Manhattan, City of New York, of a drama entitled "Over the Hills to the Poor House" based upon the dramatic version written by the defendant Frederick M. Knowles as aforesaid with the permission, assistance and participation of the defendant Knowles, and such public performances
10 given by said defendants portrayed the characters, scenes, incidents, situations and climaxes as contained in the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" and told the story as told by the said poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and the said defendants threatened to continue such infringing performances.

Nineteenth. On information and belief, that in connection with the performances and exhibitions of the aforesaid drama "Over the Hills to the Poor House" given by said defendants, the said defendants caused to be issued many posters, handbills and circulars advertising the performances of the aforesaid drama "Over the Hills to the Poor House," and caused to be issued programs given to its patrons at said performances in said 14th Street Theatre during each of said performances the following:

89th Week. Beginning Mon. Oct. 25th, 89th Week.

A Special Matinee Will Be Given Thursday, 2.30 P. M.

Messrs. Klein, McWatters, and Myers Present

"Over the Hills to the Poor House,"

A Melodrama in 4 Acts.

Adapted from Will Carleton's Celebrated Poem.

By F. M. Knowles."

11 Twentieth. Upon information and belief, that the said public performances of the aforesaid drama "Over the Hills to the Poor House" by the said defendants at the said 14th Street Theatre in the Borough of Manhattan, City of New York, were given under their direction and for the entertainment of the patrons patronizing said theatre, and that the defendants have realized large profits and income from such infringing performances, and the said defendants have never been authorized by the plaintiff or its predecessors in title to tell the story of the poems "Over the Hills to the Poor House" and "Over the Hills from the Poor House" in a dramatic performance.

Twenty-first. That prior to the commencement of this suit your complainant duly notified the defendants of such infringement and requested said defendants to discontinue the same, but said defendants

have knowingly and willfully refused to discontinue such infringing performances and knowingly and willfully continued to conduct said infringing performances, and, on information and belief, will continue the same in violation of the dramatic copyright owned by the plaintiff as aforesaid.

Twenty-second. That unless the defendants are restrained from continuing the said wrongful act above set forth the said defendants' wrongful and unlawful acts will irreparably injure the complainant and will damage it to such an extent that no damages re-
12 coverable by an action at law would afford it adequate relief.

Wherefore, complainant prays

(1) That the defendants and each of them, and their attorneys, agents, and servants, and any and all persons acting under their direction, control, permission or license, be enjoined and restrained during the pendency of this action and perpetually, from publicly performing the drama "Over the Hills to the Poor House," and from causing or permitting the said drama to be publicly performed in the said defendant's premises, or in any place owned, controlled or conducted by said defendants and from aiding or abetting the public performance of said drama "Over the Hills to the Poor House" in any such place or otherwise.

(2) That the defendants and each of them render a full and true account of all moneys or profits derived by them, or either of them, from or by reason of the performance of the said drama "Over the Hills to the Poor House."

(3) That the complainant recover from the defendants the sum of Twenty-five thousand ($25,000.00) Dollars as and for its damages, and to that end the damages sustained by complainant by reason of such infringement be assessed and ascertained.

13 (4) That the defendants pay the costs of this action and that a reasonable attorney's fee be allowed to the plaintiff.

(5) That the complainant have such other and further relief as may be just and equitable.

SAUL E. ROGERS,
Solicitor for the Complainant.

Office & P. O. Address: 55th St. & 10th Avenue, Borough of Manhattan, New York City.

14 STATE OF NEW YORK,
County of New York, ss:

Jack G. Leo, being duly sworn, deposes and says: That he is the Vice President of the Fox Film Corporation, the complain-t in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, ex-

cept as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by complainant is because complainant is a corporation and deponent an officer thereof, to wit, its Vice President.

JACK G. LEO.

Sworn to before me this 11th day of November, 1920.

---

15 *Answer of Defendant Frederick M. Knowles.*

United States District Court. Southern District of New York.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS (the First Name, "William," Being Fictitious, Real Name of This Defendant Unknown to Plaintiff), Harry Myers, and Joseph S. Klein, Defendants.

The defendant, Frederick M. Knowles, for his answer to the bill of complaint herein, respectfully shows and alleges:

First. He admits the allegations contained in paragraphs marked "First" and "Third" of said bill of complaint.

Second. He has no knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs marked "Second", "Fourth", "Fifth", "Sixth", "Sev-
16 enth", "Eighth", "Ninth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth" and "Nineteenth" of said bill of complaint, and therefore denies the same.

Third. Denies each and every allegation contained in paragraphs marked "Sixteenth" "Seventeenth", "Eighteenth", "Twentieth" "Twenty-first", and "Twenty-second" of said bill of complaint.

Further answering said bill of complaint, the defendant alleges:

Fourth. That about fourteen years ago, at the special instance and request of one Corse Payton, he made certain elaborations to and upon a play, then known as "Over the Hills to the Poorhouse."

Fifth. That when said elaborations were so made, different scenes of action and different climaxes were introduced.

Further answering said bill of complaint, defendant alleges:

Sixth. That if a production was given by the defendants Klein, McWatters and Myers, or any of the defendants herein, same was

given without the knowledge or consent and against the will
17 of this defendant, and this defendant did not authorize or give his permission to the defendants Klein, McWatters and Myers, or any of them, to print upon any programs any statement that the play or production produced by them was adopted from Will Carleton's celebrated poem by Frederick M. Knowles, and that this defendant did not realize any profits by reason of said production, and had no arrangements with any of the defendants, whereby he was to receive any moneys whatever by reason of this production.

Wheref-re, defendant having duly answered all the matters set forth in the bill of complaint prays this Honorable Court to enter its decree for the defendant by dismissing the bill of complaint with reasonable costs and charges in the matter wrongfully sustained.

Dated, New York, December 15th, 1920.

FREDERICK M. KNOWLES,
BICK, GODNICK & FREEDMAN,
Solicitors for Defendant Knowles.

18 *Verification.*

STATE OF NEW YORK,
County of Kings,
Borough of Brooklyn, ss:

Frederick M. Knowles, being duly sworn, deposes and says that he is the one of the defendants in the within action; that he has read the foreging answer and knows the contents thereof; that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

FREDERICK M. KNOWLES.

Sworn to before me this 15th day of December, 1920.

ETHAN R. KATZ,
Notary Public, Kings County.

19 *Answers of Defendants McWatters, Myers, and Klein.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Plaintiff.

against

FREDERICK M. KNOWLES, WILLIAM O. MCWATTERS, HARRY MYERS, JOSEPH KLEIN, Defendants.

The defendants, Wilbert O. McWatters, Harry Myers and Joseph S. Klein, answering the bill of complaint herein, respectfully show and allege:

First. The defendants deny that they have any knowledge or information sufficient to form a belief as to the proof of each and every allegation contained in paragraphs in the bill of complaint numbered three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen and eighteen, and therefore, the defendants deny the same.

Second. The defendants deny that the plaintiff is the right and legal owner of the right to dramatize the copyright of the
20 poems entitled "Over the Hills to the Poorhouse" and "Over the Hills from the Poorhouse", or that the plaintiff ever had any right to dramatize the same, or that the plaintiff has been damaged in any sum whatever, by reason of the acts of these defendants as set forth in the bill of complaint.

Third. The defendants deny that they infringed any rights of the plaintiff at the time when defendants were engaged in the dramatic production of "Over the Hills to the Poorhouse".

Wherefore, these defendants demand that the bill of complaint herein be dismissed with the costs of this suit, and that they have such other and further order and relief in the premises as to the Court shall seem proper.

JOSEPH S. KLEIN,
Attorney for Defendants.

Office & P. O. Address, 1493 Broadway, Borough of Manhattan, N. Y. C.

Verified by Wilbert O. McWatters, December 10th, 1920. Filed December 11th, 1920.

21 *Notice of Motion to Dismiss Bill of Complaint.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the First name, "William," Being Fictitious, Real Name of This Defendant Unknown to Plaintiff), Harry Myers and Joseph S. Klein, Defendants.

SIR:

Please take notice, that upon the bill of complaint herein, I shall move this Court at a Stated Term thereof to be held for the hearing of Motions at the Post Office Building in the Borough of Manhattan, City of New York on the 8th day of April, 1921, at 10:30 A. M., or as soon thereafter as counsel can be heard for an order

dismissing the bill of complaint herein on the ground that
22 there are not sufficient facts contained therein to make out a cause of action, and for such other and further relief as may be just and proper in the premises.

Dated, March 30th, 1921.

Yours, etc.,

BICK, GODNICK & FREEDMAN,
Sols. for Deft. Knowles.

Office & P. O. Address, No. 215 Montague Street, Borough of Brooklyn, City of New York.

To Saul E. Rogers, Sol. for complainant, 55th Street and 10th Avenue, New York City.

23 *Opinion of Hon. John C. Knox, D. J.*

United States District Court, Southern District of New York.

E 19—280.

FOX FILM CORPORATION, Plaintiff,

against

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the First name, "William," Being Fictitious, Real Name of This Defendant Unknown to Plaintiff), Harry Myers and Joseph S. Klein, Defendants.

Upon defendants' motions to dismiss complainant's bill, it being alleged that the same fails to state a cause of action.

Saul E. Rogers (Saul E. Rogers, Percy Heiliger, of counsel), for complainant;

Bick, Godnick & Freedman (Fred Francis Weiss, Louis R. Bick, of counsel), for defendants.

KNOX, *D. J.*:

The bill of complaint, so far as is now material, contains the following allegations of fact:

24 That Will Carleton was the author of a collection of poems, among which was one entitled "Over the Hill to the Poor-House," and another "Over the Hill from the Poor-House." Carleton assigned his interest in the poems together with the right to secure copyright thereon to Harper & Brothers, publishers. Upon February 21, 1873, said assignees duly copyrighted the said collection of poems, and published the same under the title of "Farm Ballads."

On January 7, 1901, and within one year of the expiration of the copright to Harper & Brothers, Carleton applied for and obtained

a so-called renewal thereof. The expiration of this renewal was February 21, 1915.

Carleton died December 18, 1912, leaving a will, wherein one Norman E. Goodrich was named as executor and made sole legatee of the testator's property. Letters testamentary were issued to Goodrich, in Kings County, New York upon March 21, 1913. Upon January 21, 1915 Goodrich "as executor and sole legatee of the estate of said Will Carleton duly filed an application for the renewal of said copyright" (obtained by Carleton) * * * "in accordance with the Copyright Law of the United States * * * and on or about the 21st day of January, 1915 the said copyright of the collection of poems entitled 'Farm Ballads,' including 'Over the Hill to the Poor-House' and 'Over the Hill from the Poor-House,' was duly renewed from February 21, 1915, for the period of fourteen years to and incuding on or about February 21, 1929."

25 All of the various publications of the said collection of poems are said to have been suitably inscribed.

On July 7, 1915, Norman E. Goodrich died. He left a will in which he gave all of his property to his wife, Alice L. Goodrich, and named her as executrix. This will was probated, and Mrs. Goodrich qualified thereunder.

By instrument dated October 26, 1920, Mrs. Goodrich purported to assign to plaintiff the sole dramatic copyright of the above-named "Poor-House" poems with the exclusive right to dramatize the same for production throughout the world. It is said that the poems lend themselves to the making of a practical and effective stage representation thereof.

The bill proceeds to allege that defendant Knowles, without the consent of plaintiff or its predecessors in title, and in infringement of plaintiff's dramatic rights, wrote a drama entitled "Over the Hills to the Poor House," which drama, with its elaborations and modifications, tells the story of Carleton's poem of that name. That thereafter, defendants Klein, McWatters and Myers, likewise without proper consent and with knowledge of plaintiff's alleged rights, and within this district, gave public performances and exhibitions of a drama entitled by the name of Knowles' dramatic version of the Carleton poem.

The foregoing averments, with certain others supplementary thereto, constitute the basis of complainant's claim to equitable relief.

26 Under Equity Rule 29 defendants seek the dismissal of the bill of complaint, it being contended that the same, upon its face, shows a failure of title to any copyright existing upon the poem in question.

It will be noted that complainant's bill does not state if, upon his decease, Will Carleton left him surviving a widow, or children, or any next of kin. In view of the source from which complainant asserts its alleged title, I consider the foregoing omission to be a defect in pleading. This is so by reason of the provisions of Section 24 of the copyright statute which regulates the succession of title to

copyright renewals. However, were it not for what I consider other insuperable objections I should allow complainant to amend its bill in the particulars just mentioned.

Since the present motion was argued and submitted, the Circuit Court of Appeals for this Circuit, speaking through Judge Hough, has decided the case of Silverman v. Sunrise Pictures Corporation. What was there said makes, I think, a substantial contribution to the law of copyright and is determinative of the result to be reached upon this motion.

The Court said:—"* * * we regard it as settled:

"(1) That the proprietor of an existing copyright as such has no right to a renewal.

27 "(2) There is nothing in Paige v. Banks, 13 Wall., 608, opposed to this ruling.

"(3) The statute confers no right of renewal upon administrators.

"(4) The purpose of the statutory renewal provisions is to give to the persons enumerated in the order of their enumeration a new right or estate, not growing legally out of the original copyright property, but a new creation for the benefit (if the author be dead) of those naturally dependent upon or properly expectant of the author's bounty."

Propositions (1), (2) and (3) effectively dispose of defendants' argument that the renewal which Carleton obtained of the original copyright issued to Harper & Brothers, was not held by him as Trustee for the publishers.

The Silverman case further holds that "Legatees as such never have any renewal rights because they are not named in the statute." Therefore, assuming that Norman E. Goodrich, as legatee of the author Carleton, acquired title to the renewal of the copyright which expired February 21, 1915, he could not again renew the same, for the reason that—and again I quote from the Silverman case—

"* * * the author cannot take away the rights of widow, children, &c., before the opening of the last year of original copyright. It is not until then that any estate or chose in action
28 arises or exists; and when such right arises it is,—as above stated—a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right eo nomine which is exactly what the statute was designed to prevent.

"But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

As it was with Mrs. Wilson so it was with Will Carleton—he died before the opening of the year within which the renewal obtained by him could again be renewed.

Judge Hough further said:—

"* * * we construe the section as vesting the right in, or imposing the duty on executors, only when the power or privilege of obtaining renewal was existing in the testator—author at the moment of decease. This avoids the anomaly of requiring executors as such, to do something in respect of a property right not passing by the will appointing them, or capable of so passing. It is
29 consequently held here, that since this renewal right did not exist, it was not affected by the will or the appointment of executors; in short there was a necessary absence of a will in respect of this right which only came into existence some five years after the testatrix died."

From this I reach the conclusion that neither as legatee, nor as executor, did Norman E. Goodrich obtain any valid copyright by the action taken by him on or about February 21, 1915. He therefore, had nothing which he could bequeath to his wife, and she in turn conveyed no title to complainant.

The bill, therefore, will stand dismissed.

May 18, 1921.

30 *Decree.*

At a stated term of the United States District Court held in and for the Southern District of New York at the Post Office building, in the Borough of Manhattan, city of New York, on the 3rd day of June, 1921.

Present: Hon. John C. Knox, United States District Judge.

Fox Film Corporation, Complainant,

vs.

Frederick M. Knowles, "William" O. McWatters (the First Name, "William" Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff), Harry Myers, and Joseph S. Klein, Defendants.

The defendant, Frederick M. Knowles, having made a motion to dismiss the complainant's bill of complaint on the ground that it fails to state facts sufficient to constitute a cause of action, and after hearing counsel for the respective parties hereto, and due deliberation having been had,

31 It is on motion of Bick, Godnick & Freedman, solicitors for the defendant Frederick M. Knowles.

Ordered, adjudged and decreed, that the complainant, Fox Film

Corporation, has no valid copyright to the poem entitled "Over the Hills to the Poorhouse," and to the poem entitled "Over the Hills from the Poorhouse," nor has it the exclusive right to dramatize the said poems, or either of them, and it is further

Ordered, adjudged and decreed, that the Fox Film Corporation, the complainant herein, has no valid title to any copyright of the poems entitled "Over the Hills to the Poorhouse" and of the poem entitled "Over the Hills from the Poorhouse" and it is further

Ordered, adjudged and decreed, that the bill of complaint herein be and the same hereby is dismissed with costs, and it is further

Ordered, adjudged and decreed, that the defendant Frederick M. Knowles, do recover from the complainant Fox Film Corporation, the sum of Twenty-nine and 70/100 ($29.70/100) Dollars, as costs to be taxed by the Clerk of this Court, and that the defendant Frederick M. Knowles have execution therefor.

JOHN C. KNOX,
United States District Judge.

32 *Notice of Motion to Amend Decree.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, First Name "William," Fictitious, True First Name Unknown to Plaintiff, Harry Myers, and Joseph S. Klein, Defendants.

SIR:

Please take notice, that upon the annexed affidavit of Fred Francis Weiss, verified the 11th day of June, 1921, and upon the decree herein, and upon all the pleadings and proceedings, the undersigned will move this Court at a Stated Term thereof, to be held for the hearing of motions, at the Post Office Building in the Borough of Manhattan, City of New York, on the 17th day of June, 1921, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order amending the decree herein, by inserting therein a reasonable attorney's fee, and for such other and
33 further relief as may be just and proper in the premises.

Dated, June 11th, 1921.

Yours etc.,

BICK, GODNICK, & FREEDMAN,
Solicitors for Def. Knowles.

215 Montague Street, Brooklyn, N. Y.

To Saul E. Rogers, Solicitor for Plaintiff, 55th St. & 10th Avenue, New York City.

Affidavit of Fred Francis Weiss in Support of Motion to Amend Decree.

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, First Name, "William," Fictitious, True First Name Unknown to Plaintiff, Harry Myers, and Joseph S. Klein, Defendants.

CITY AND STATE OF NEW YORK,
County of Kings, ss:

Fred Francis Weiss, being duly sworn, deposes and says that he is associated with the firm of Bick, Godnick & Freeman, solicitors for the defendant Frederick M. Knowles in the above entitled action.

This action was brought by the plaintiff, Fox Film Corporation to restrain the defendants from infringing their alleged copyright to the film known as "Over the Hill," which was based upon Will Carleton's poems known as "Over the Hills to the Poor House" and "Over the Hills from the Poorhouse" and also to recover damages in the sum of Twenty-Five Thousand ($25,000) Dollars, together with costs and a reasonable attorney's fee.

The complaint was served upon the defendant, Frederick M. Knowles, on or about the 15th day of November, 1920. A Notice of Appearance was filed on behalf of the defendant Frederick M. Knowles on or about the 14th day of December, 1920.

It required a careful examination of the complaint to interpose a proper answer thereto, which necessitated an extension of time to answer, which was granted by the plaintiff's attorney, to the 23rd day of December, 1920.

That on or about the 23rd day of December, 1920 issue was joined by the service of the defendant Knowles' answer to the complaint.

That this case then was added to the calendar of this Court for trial.

That in March, 1921, I started to prepare this case for trial, and after a careful examination of the complaint herein, and the answer, came to the conclusion that the bill of complaint failed to state facts sufficient to constitute a cause of action, and thereupon, on the 30th day of March, 1921, made a motion to dismiss the complaint under Rule 29 of the Equity Laws of this Court.

This motion came on to be heard before Judge Knox on the 8th day of April, 1921, and was argued at length, and briefs were submitted.

That in preparing the memorandum, I spent a number of days in looking up the law with reference to the points involved, and spent another two days in preparing the brief. In this brief a number of points were discussed.

It required the examination of various text books, a study of many

cases and examination of the opinions of the Attorney General with reference to the copyright statutes.

After the submission of the briefs, Judge Knox rendered a decision dismissing the bill of complaint.

On the 3rd day of June, 1921, a decree was entered in accordance with the opinion, which decree dismissed the bill of complaint.

In the decree we failed to provide for a reasonable attorney's fee.

We, therefore, ask this Court for an order, amending the decree, by inserting therein a provision for the allowance to the defendant Knowles, an attorney's fee commensurate with the labors performed, together with the importance of the case, and the results obtained.

No previous application for this relief has been made, and your deponent will ever pray, etc.,

FRED FRANCIS WEISS.

Sworn to before me this 11th day of June, 1921.

RHODA MENDLE,
Notary Public, Kings County.

Kings Co. Clerk's No. 250.
Kings Co. Register's No. 2266.
Certificate filed in New York County.
Clerk's No. 704; Register's No. 2532.
Terms expires March 30th, 1922.

37 *Affidavit of Percy Heiliger in Opposition to Motion to Amend Decree.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Plaintiff,

against

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the first name, "William," Being Fictitious, True First Name Unknown to Plaintiff), Harry Meyers, and Joseph S. Klein, Defendants.

STATE OF NEW YORK,
City and County of New York, ss:

Percy Heiliger, being duly sworn, deposes and says:

That he is associated with Saul E. Rogers, Esq., solicitor for the plaintiff in the above entitled action.

That your deponent has read the affidavit of Mr. Weiss, of counsel for the defendant Frederick M. Knowles, in support of the application for a counsel fee in the above entitled suit, and
38 while the facts therein stated are substantially correct, the learned counsel for the defendant, Frederick M. Knowles, neglects to mention certain other matters in connection with his motion to dismiss the bill, which indicate that the attorney for the defendant Knowles is not entitled to any attorney's fee in said suit.

In the first place, the defendant Knowles was not a very important party or factor in the prosecution of the above suit, as the actual alleged infringement was perpetrated by the defendants Harry Myers and Joseph S. Klein, the lessees of the 14th Street Theatre, who were represented by different counsel, and who did not join in any wise in said motion to dismiss the bill.

Furthermore it is apparent from the opinion of the learned Court dismissing the bill, that every one of the points and contentions raised by the learned counsel in support of his motion to dismiss the bill were overruled by the Court with the possible exception of the point raised that the bill failed to state specifically "that there were no widow, children, etc.," in accordance with the renewal copyright law, and which slight defect the learned Court held would have been unquestionably amendable. The real ground for the dismissal of the bill was because of the fact that after the argument of the motion to dismiss the bill, the learned Circuit Court of Appeals, in Silverman vs. Sunrise Pictures Corporation, rendered a
39 decision, which the learned District Court held made "a substantial contribution to the law of copyright and is determinative of the result to be reached on this motion." In other words, the alleged copyright of the plaintiff was held to be defective because it was determined in accordance with the Silverman case, that by reason of the fact that Will Carleton died in 1912; and not in 1914, within one year from the expiration of his first renewal copyright, that said executor and sole legatee had no right to make an application for a second renewal copyright, or being the sole legatee, could obtain no further rights of renewal. Although it is submitted that in my opinion the facts in the Silverman case were not exactly identical with the facts of the case at bar, nevertheless, in view of the attempted general statement of the law with reference to renewal copyrights contained in the said Silverman case, the learned District Court was undoubtedly compelled to follow such law laid down and dismiss the bill.

In view of all circumstances, therefor-, above mentioned, it is respectfully submitted that this is not a case where counsel is entitled to any attorney's fee, or if at all, a very nominal one. If he has gone to considerable trouble in looking up law on points that have been determined adversely to him, surely, the defendant should not pay for such labors. As the allowance of an
40 attorney's fee is discretionary with the Court in accordance with Section 40 of the Copyright Act, an allowance herein should not be granted.

PERCY HEILIGER.

Sworn to before me this 16th day of June, 1921.

GEORGE BLISS,
Commissioner of Deeds, City of New York.

41 *Affidavit of Fred Francis Weiss.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Complainant,

vs.

FREDERICK M. KNOWLES et al., Defendants.

CITY AND STATE OF NEW YORK,
County of Kings, ss:

Fred Francis Weiss, being duly sworn, deposes and says: that I have had charge of this litigation from its inception, and am fully acquainted with all the proceedings had herein.

That when the defendant Knowles was served with process in this litigation, I immediately got in communication Saul E. Rogers, the attorney for the plaintiff, and asked him to discontinue against our client Knowles, as we did not believe he should have been made a party; that it would be expensive for Knowles to litigate.

Mr. Rogers refused to discontinue the suit against Knowles, whereupon I suggested to him that I would give him a consent
42 decree, and also consent to the issuance of an injunction, but no costs or damage should be demanded by him of our client.

This suggestion on my part, did not meet with Mr. Rogers' approval, and it then became necessary for us to litigate the matter.

We believe the Court should take these facts into consideration in the consideration of the question of the amount of the counsel fee to be allowed.

The reason for submitting this affidavit is because of the statement made in the affidavit in opposition that Knowles was a nominal defendant, which, to the mind of your deponent, aggrivates instead of mitigating the matter.

FRED FRANCIS WEISS.

Sworn to before me this 17th day of June, 1921.

RHODA MENDEL,
Notary Public, Kings County.

Kings Co. Clerk's No. 250.
Kings Co. Register's No. 2266.
Certificate filed in New York County.
Clerk's No. 704; Register's No. 2532.
Term expires March 30th, 1922.

43 *Memorandum Opinion, Knox, D. J.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, the First Name, "William," Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff, Harry Meyers, and Joseph S. Klein, Defendants.

The defendant Knowles will be allowed by way of attorney's fee, payable by plaintiff, the sum of $150. In view of Knowles' offer to permit a consent decree to be taken against him, and plaintiff's refusal to assent thereto, I think he should, upon his motion to dismiss being held to be well founded, be entitled to receive something by way of counsel fees. My decision on the dismissal being largely controlled by a decision of the Circuit Court of Appeals rendered subsequent to argument before me I have made the amount of the fee smaller than I might otherwise have done had defendant prevailed.

JNO. C. KNOX,
U. S. D. J.

June 18, 1921.

44 *Final Amended Decree.*

At a stated term of the United States *States* District Court held in and *and* for the Southern District of New York at the Post Office Building, in the Borough of Manhattan, City of New York, on the 23rd day of June, 1921.

Present: Hon. John C. Knox, District Judge.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, the First Name, "William," Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff, Harry Myers, and Joseph S. Klein, Defendants.

The defendant, Frederick M. Knowles, having made a motion to amend the decree entered herein on the 3rd day of June,
45 1921, by inserting, therein a reasonable attorney's fee, and the matter having come on for argument, and after hearing counsel for the respective parties.

It is, on motion of Bick, Godnick & Freedman, solicitors for the defendant Frederick M. Knowles,

Ordered, adjudged and decreed, that the decree made on the 3rd day of June, 1921, and entered in the office of the Clerk on the 7th day of June, 1921, be and the same hereby is amended to read as follows:

46 At a stated term of the United States District Court held in and *and* for the Southern District of New York at the Post Office building, in the Borough of Manhattan, city of New York, on the 3rd day of June, 1921.

Present: Hon. John C. Knox, District Judge.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, the First Name, "William," Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff, Harry Myers, and Joseph S. Klein, Defendants.

The defendant, Frederick M. Knowles, having made a motion to dismiss the complainant's bill of complaint on the ground that it fails to state facts sufficient to constitute a cause of action, and after hearing counsel for the respective parties hereto, and due deliberation having been had

It is, on motion of Bick, Godnick & Freedman, solicitors for the defendant Frederick M. Knowles,

47 Ordered, adjudged and decreed, that the complainant, Fox Film Corporation, has no valid copyright to the poem entitled "Over the Hills to the Poorhouse" and to the poem entitled "Over the Hills from the Poorhouse," nor has it the exclusive right to dramatize the said poems, or either of them, and it is further

Ordered, adjudged and decreed, that the Fox Film Corporation the complainant herein, has no valid title to any copyright of the poems entitled "Over the Hills to the Poorhouse," and of the poem entitled "Over the Hills from the Poorhouse," and it is further

Ordered, adjudged and decreed, that the bill of complaint herein be and the same hereby is dismissed with costs, and it is further

Ordered, adjudged and decreed, that the defendant Frederick M. Knowles do recover from the complainant Fox Film Corporation, the sum of Twenty nine and 70/100 ($29.70) Dollars, as costs to be taxed by the Clerk of this Court, and the sum of One hundred fifty ($150.00) Dollars, as and for a reasonable attorney's fee, making the sum of One hundred seventy-nine and 70/100 Dollars, as his costs and that the defendant Frederick M. Knowles, have execution against the Fox Film Corporation therefor.

JOHN C. KNOX,
United States District Judge.

48 *Petition for Appeal.*

United States District Court, Southern District of New York.

E—19—290.

FOX FILM CORPORATION, Complainant,

against

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the First Name, "William," Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff), Harry Meyers, and Joseph S. Klein, Defendants.

To the Honorable J. M. Mayer, District Judge:

The above named complainant Fox Film Corporation, feeling aggrieved by the decree made and entered in the above entitled action on the 3rd day of June, 1921, and the amended decree made and entered in the above entitled action on or about the 23rd day of June, 1921, which decree and amended decree dismissed the bill of complaint with costs and granted an allowance of One hundred and fifty ($150.00) dollars to the attorneys for the defendant, Frederick M.
49 Knowles, does hereby appeal from said decree and amended decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons set forth in assignment of errors filed herewith, and prays that this appeal be allowed; and that citations be issued as provided by law; and that a transcript of the record, proceedings and documents upon which the decree was based duly authenticated be sent to the United States Circuit Court of Appeals for the Second Circuit under the rules in said Court in such cases made and provided and your petitioner further prays that the proper order relating to the required security to be required of it be made.

Dated August 15th, 1921.

FOX FILM CORPORATION,
By JACK G. LEO,
Vice-Pres.
SAUL E. ROGERS, ESQ.,
Solicitor for Complainant.

Office & P. O. Address, 55th St. & Tenth Ave., Borough of Manhatton, New York City.

50 *Order Allowing Appeal.*

Appeal allowed upon giving bond as required by law for the sum of $500 *Dollars*, the same to act as a supersedeas bond to said execu-

tion pending appeal, and also as a bond for costs and damages on appeal.

Dated, New York, August 29, 1921.

J. M. MAYER,
U. S. D. J.

51 *Assignment of Errors.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Complainant,

against

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS (the First Name, "William," Being Fictitious, the Real Name of This Defendant Being Unknown to Complainant), Harry Myers, and Joseph S. Klein, Defendants.

Now comes the complainant in the above entitled action and files the following assignment of errors, which it will require upon its prosecution of the appeal in the above entitled cause from the decree made by this Honorable Court on the 3rd day of June, 1921, and the amended decree made on or about the 23rd day of June, 1921

1. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that it did not allege facts sufficient to constitute a cause of action for infringement of the dramatic copyright of two

52 poems entitled "Over the Hill to the Poor House" and "Over the Hill from the Poor House" written by Will Carleton, and which were published in a collection of other poems entitled "Farm Ballads."

2. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that Norman E. Goodrich, executor and sole legatee of the author Will Carleton, and the complainant's predecessor in title did not obtain a second valid renewal copyright of the poems "Over the Hill to the Poorhouse," and "Over the Hill from the Poor House" which renewal copyright purported to extend from the year 1915 to and including the year 1929.

3. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that Norman E. Goodrich, executor and sole legatee of the author Will Carleton, and the complainant's predecessor in title did not obtain a second valid renewal copyright of a collection of poems entitled "Farm Ballads" which renewal copyright purported to extend from the year 1915 to and including the year 1929.

4. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that after the decease of Will Carleton the author of "Over

the Hill to the Poor House" and "Over the Hill from the
53 Poor House" in 1912, he could not give or devise by will to any legatee or distributee whether same were his executor or any other persons, the right to obtain and receive the benefit of a further renewal copyright, although said author and owner of the first renewal copyright left him surviving no widow, children or heirs.

5. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that after the decease of Will Carleton the author of the collection of poems entitled "Farm Ballads" in 1912, he could not give or devise by will to any legatee or distributee whether same were his executor or any other persons, the right to obtain and receive the benefit of a further renewal copyright although said author and owner of the first renewal copyright left him surviving no widow, children or heirs.

6. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that although the author Will Carleton of the poems "Over the Hill to the Poor House" and "Over the Hill from the Poor House" and holder of the first renewal copyright which expired in 1915, left him surviving no widow, children or heirs, his executor, Norman E. Goodrich, before the expiration of said renewal copyright or at any other time, could not make a valid application for a further renewal of said copyright or in any manner obtain by reason of such application a valid renewal of said copyright which
54 would inure to the benefit of the legatees or distributees under the will of said author, whether same were the executor or any other persons, unless Will Carleton, the said author and holder of the first renewal copyright, died in 1914, one year before the expiration of the first renewal copyright obtained by him and which first renewal copyright expired in 1915.

7. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that although the author, Will Carleton, of the collection of poems entitled "Farm Ballads" and holder of the first renewal copyright which expired in 1915, left him surviving no widow, children or heirs, his executor, Norman E. Goodrich, before the expiration of said renewal copyright, or at any other time, could not make a valid application for a further renewal of said copyright, or in any manner obtain by reason of such application, a valid renewal of said copyright which would inure to the benefit of the legatees or distributees under the will of said author, whether same were the executor or any other persons, unless Will Carleton, the said author and holder of the first renewal copyright died in 1914, one year before the expiration of the first renewal copyright obtained by him and which first renewal copyright expired in 1915.

8. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the

55 ground that even if an author dies leaving him surviving no widow, children or heirs, an executor cannot make a valid application for a renewal of copyright or obtain by reason of said application a valid renewal copyright for the benefit of the legatees or distributees unless the author dies within one year from the expiration of his copyright.

9. That the United States District Court for the Southern District of New York erred in dismissing the bill of complaint on the ground that even if the author dies leaving no widow, children or heirs, but leaves a will bequeathing all his property to a sole legatee who is also an executor named under said will, such executor cannot, under the copyright law, make a valid application for a further renewal copyright or obtain the benefit of same unless said author dies within a year preceding the expiration of said first renewal copyright, and in such event the next of kin, if any, would have a prior right to the said executor to make a valid application for a further renewal copyright and obtain the benefits therefrom.

Whereas the appellant prays that the said decree and amended decree be reversed, and that the said District Court for the Southern District of New York be ordered to enter a decree reversing the decision of the lower Court in said case.

SAUL E. ROGERS,
Attorney for Appellant.

Office and P. O. Address, 840 Tenth Avenue, Borough of Manhattan, New York City.

56 *Bond for Damages and Costs.*

District Court of the United States of America for the Southern District of New York, in the Second Circuit.

FOX FILM CORPORATION, Plaintiff,

vs.

FREDERICK M. KNOWLES et al., Defendant-.

Know all men by these presents that we, Fox Film Corporation, as Principal, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, County and State of New York, as Surety, are held and firmly bound unto the above named Frederick M. Knowles et al., in the sum of Five Hundred ($500.00) Dollars, to be paid to the said Frederick M. Knowles et al., for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally firmly by these presents.

57 Sealed with our seals and dated the 30th day of August, 1921.

Whereas, the above named Fox Film Corporation has prosecuted its appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the decree dated the 3rd day of June, 1921, rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such that if the above named Fox Film Corporation, shall prosecute its appeal to effect and answer all damages and costs if it fails to make its appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

FOX FILM CORPORATION, [L. S.]
By JACK G. LEO. [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By S. FRANK HEDGES,
Attorney-in-Fact.

Attest:
[SEAL.] WILLIAM H. ESTWICK,
Attorney-in-Fact.

58 STATE, CITY AND COUNTY OF NEW YORK, *ss:*

On this 31st day of August, 1921, before me came Jack G. Leo, to me known, who being by me duly sworn, did depose and say that he resides in the Borough of Bronx, City of New York; that he is the vice-president of the Fox Film Corporation, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

GEORGE BLECH,
Commissioner of Deeds, City of New York.

N. Y. County Clerk's No. 21140.
Kings County Clerk's No. 1108.
Commission expires Oct. 6, 1921.

59 STATE OF NEW YORK,
County of New York, ss:

On the 30th day of August, 1921, before me personally came S. Frank Hedges, known to me to be the Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Fox Film Corporation as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said

Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Fox Film Corporation, is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Attorney-in-fact of said Company; and that he is acquainted with William H. Estwick, and knows him to be the Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is in the genuine handwriting of William H. Estwick, and was thereto subscribed by order and authority of said Board of Directors and in the presence of said deponent, and that the assets of said Company, unincumbered and liable to execution exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 30th day of August, 1921.

C. H. BRADBURY,
Notary Public, Westchester County.

Certificates filed in the following counties:

New York Clerk's No. 791.
Register's No. 3632.
Kings, Clerk's No. 79.
Register's No. 3329.
Bronx, Clerk's No. 49.
Register's No. 52.
Queens No. 524.
Richmond, Nassau, Orange, Suffolk and Rockland.
Term Expires March 30th, 1923.

61 *Citation.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Complainant-Appellant,

against

"WILLIAM" O. McWATTERS (the First Name, "William," Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff), Harry Myers, and Joseph S. Klein, Defendants, and Frederick M. Knowles, Appellee-Defendant.

UNITED STATES OF AMERICA, *ss:*

To Frederick M. Knowles, Appellee-Defendant, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the
62 Second Circuit, to be held at the United States Court House at Postoffice Building, Borough of Manhattan, New York City, N. Y., on the sixth day of October, 1921, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein the Fox Film Corporation is complainant-appellant and you are appellee, to show cause, if any there be, why the decree entered against said appellant as in said appeal mentioned should not bet corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. M. Mayer, Judge of the District Court of the United States for the Southern District of New York, this 22nd day of September, in the year of our Lord, one thousand nine hundred and twenty-one, and of the Independence of the United States, the 146th.

J. M. MAYER,
United States District Judge.

63 *Stipulation.*

United States District Court, Southern District of New York.

FOX FILM CORPORATION, Complainant-Appellant,

against

FREDERICK M. KNOWLES, Defendant-Appellee, and "WILLIAM" O. McWatters (the First Name, "William," Being Fictitious, Real Name of This Defendant Unknown to Paintiff), Harry Myers, and Joseph S. Klein, Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, New York, October 31st, 1921.

SAUL E. ROGERS,
Attorney for Complainant-Appellant.
BICK, GODNICK & FREEDMAN,
Attorneys for Defendant-Appellee Frederick M. Knowles.

64 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

FOX FILM CORPORATION, Complainant-Appellant,

against

FREDERICK M. KNOWLES, Defendant-Appellant, and "WILLIAM" O McWatters (the First Name, "William," Being Fictitious, Real Name of This Defendant Unknown to Plaintiff), Harry Myers and Joseph S. Klein, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony Whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 31st day of October, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

65 *Decision C. C. A.*

United States Circuit Court of Appeals for the Second Circuit.

Before Hough, Manton, Mayer, JJ.

FOX FILM CORPORATION, Complainant-Appellant,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the First Name, "William," Being Fictitious, the Real Name of This Defendant Being Unknown to Plaintiff), Harry Myers, and Joseph S. Klein, Defendants-Appellees.

FOX FILM CORPORATION, Complainant-Appellant,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS Baret, Corse Payton, Corse Payton Stock Company, and Johr Kaiser, Defendants-Appellees.

Saul M. Rogers, for Appellant.
Fred F. Weiss, for Appellee.

Per Curiam:

Decrees affirmed on authority of Silverman vs. Sunrise, etc., Co., 273 Fed., 909.

66 *Order for Mandate.*

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit held at the Court Rooms, in the Post Office building, in the city of New York, on the 2nd day of February, one thousand nine hundred and twenty-two.

Present:

Hon. Charles M. Hough,
Hon. Martin T. Manton,
Hon. Julius M. Mayer,
Circuit Judges.

FOX FILM CORPORATION, Complainant-Appellant,

v.

FREDERICK M. KNOWLES et al., Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

67 On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

C. M. H.
M. T. M.

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. Fox Film Corpn. v. F. M. Knowles, et al. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 2, 1922. William Parkin, Clerk.

68 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 67 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Fox Film Corporation Complainant-Appellant, against Frederick M. Knowles, et al., Defendants-Appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 16th day of February in the year of our Lord One Thousand Nine Hundred and Twenty-two and of the Independence of the said United States the One Hundred and Forty-sixth.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

69 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which Fox Film Corporation is appellant, and Frederick M. Knowles, "William" O. McWatters (the first name "William" being fictitious, the real name of this defendant being unknown to plaintiff), Harry Myers and Joseph S. Klein, are appellees, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain

reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby
70 command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

71 [Endorsed:] File No. 28781. Supreme Court of the United States, October Term, 1921. No. 826. Fox Film Corporation vs. Frederick M. Knowles et al. Writ of certiorari. United States Circuit Court of Appeals, Second Circuit. Filed May 5, 1922. William Parkin, Clerk.

72 In the Supreme Court of the United States, October Term, 1921.

No. 826.

FOX FILM CORPORATION, Petitioner,

v.

FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the First Name, "William," Being Fictitious, the Real Name of this Defendant Being Unknown to Plaintiff), Harry Myers, and Joseph S. Klein, Respondents.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Second Circuit to the writ of certiorari granted therein.

SAUL E. ROGERS,
Counsel for Petitioner.
LOUIS R. BICK,
Counsel for Respondent.

73 To the Honorable the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having, lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of

counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated New York May 6, 1922.

[Seal of the United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

74 & 75 [Endorsed:] 826—28781. United States Circuit Court of Appeals, Second Circuit. Fox Film Corporation v. F. M. Knowles, et al. Return to certiorari.

76 [Endorsed:] File No. 28781. Supreme Court U. S., October Term, 1921. Term No. 826. Fox Film Corporation, Petitioner, vs. Frederick M. Knowles et al. Writ of certiorari and return. Filed May 11, 1922.

Office Supreme Court, U.S.
FILED
MAY 27 1922
WM. R. STANSBU
CLE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 825. 310

FOX FILM CORPORATION,

Appellant,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,

Appellees.

NOTICE OF MOTION AND PETITION TO ADVANCE.

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

Motion to Advance.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

FOX FILM CORPORATION,
Appellant,
against
FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,
Appellees.
#825.

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Saul E. Rogers, verified May 26, 1922, the undersigned will move this court, at a stated term thereof, to be held at the Supreme Court of the United States, Washington, D. C., on the 29th day of May, 1922, at the opening of court on that day, or as soon thereafter as counsel can be heard, for leave to advance the above entitled appeal, on the ground that it involves or affects a matter of general public interest, or in the alternative that the said appeal herein be transferred to the Summary Docket for the first Monday of October, 1922, by reason of the fact that the argument of the appeal herein and the argument of the appeal in the case of Fox Film Corporation, Appellants vs. Fderedick M. Knowles, et

al., Appellees, #826, involving the same questions, will not take over one-half hour for the appellant and the same time for the appellees, and for such other and further relief as may be proper in the premises.

Dated New York, May 26th, 1922.

Yours, etc.,

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

To:
BICK, GODNICK & FREEDMAN, Esqs.,
Attorneys for Appellees,
215 Montague Street,
Borough of Brooklyn,
New York City.

Petition to Advance the Above Entitled Appeal. 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

FOX FILM CORPORATION,
Appellant,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,
Appellees.

#825. 8

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of Saul E. Rogers, attorney for the appellant, respectfully shows and alleges:

FIRST: That this is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the District Court of the Southern District of New York dismissing the appellant's complaint in an action for infringement by the appellant against the appellees, in which it was determined that the appellant had no valid renewal dramatic copyright of two poems written by Will Carleton entitled "Over the Hill to the Poorhouse" and "Over the Hill from the Poorhouse", contained in a col- 9

10 lection called "Farm Ballads." Upon the authority of *Silverman* vs. *Sunrise Picture Corporation*, also decided in the Second Circuit (273 Federal Reporter, 909), it was determined that Section 24 of the Copyright Act was construed to be that in the absence of the widow or children the executor had no right to obtain a renewal of the prior copyright, unless the power or privilege of obtaining the renewal was existing in the testator-author at the moment of decease.

SECOND: On an application made by the appellant for a Writ of Certiorari to this Honorable
11 Court, said writ was duly granted on April 17, 1922, and the return to said writ has been duly filed with the Clerk of this Court on or about May 10, 1922.

REASONS FOR THE ALLOWANCE OF THE MOTION TO ADVANCE.

1. The question is one of great importance to the motion picture industry which is now using dramatic compositions in which the copyright protection is similar to that in this case. By reason of the uncertainty of the law with respect to the renewal of copyrights, producers hesitate
12 to invest large sums of money necessary to produce pictures that may involve the validity of a renewal copyright, when there is such uncertainty as to copyright protection.

2. The question is also of great importance because your petitioner is advised that recently several cases have arisen in the District Courts

and the Circuit Court of Appeals involving the same question, and that these cases are being held up pending the determination of this Court in the instant case. 13

3. The question is of great importance also to authors and dramatists, or their widows and children, or executors, legatees, or next-of-kin, in the numerous cases where the author has not lived to within one year of the expiration of his copyright.

Your petitioner is informed that registrations for renewal of copyrights are frequent, and until the law with respect to the renewal of copyrights is settled by this Court, persons who have been heretofore considered by Congress to be the natural recipients and objects of the author's bounty with reference to obtaining the benefits of renewal copyrights, are unable to dispose of such rights until the law with respect to renewal copyrights is settled by this honorable Court. 14

For the above reasons it is respectfully submitted that leave should be granted to advance the above appeal, because it involves or affects some matter of general public interest.

REASONS FOR TRANSFERRING APPEAL TO SUMMARY DOCKET FOR THE FIRST MONDAY OF OCTOBER, 1922. 15

Your petitioner further respectfully submits that in the alternative that leave be granted to transfer the above entitled appeal to the Summary Docket for the first Monday of October, 1922, for the reason that your petitioner, who intends to

16 argue the appeal alone on behalf of the appellant and the appeal in another case, entitled *Fox Film Corporation*, Appellant, vs. *Frederick M. Knowles, et al.*, Appellees, #826, involving the same question, will not take up more than one-half an hour in his argument in both cases before this Court, and your petitioner is also advised that counsel for the appellees have stated that they do not expect to take any longer time than one-half an hour in their argument in both cases on behalf of the appellees before this Court.

For the above reasons it is submitted that leave should be granted to advance this appeal to the
17 Summary Docket for the first Monday of October, 1922.

WHEREFORE, your petitioner prays that the motion for leave to advance herein be granted, because the appeal involves a matter of general public interest, or in the alternative that the appeal be transferred to the Summary Docket for the first Monday of October, 1922, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

SAUL E. ROGERS,
18 Petitioner.

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.: 19

SAUL E. ROGERS, being duly sworn, deposes and says:

That he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

SAUL E. ROGERS.

Sworn to before me this
26th day of May, 1922. } 20

George Black

21

Supreme Court of the United States.

October Term, 1922.

No. 210.

FOX FILM CORPORATION,

Petitioner,

against

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITIONER'S BRIEF.

Saml. E. Rogers,
Attorney for Petitioner.

INDEX.

	PAGE
Copyright of Poems by Harper & Bro., 1873	2
Renewal Application by Author in 1901	2
Death of Author in 1912	2
Application by Goodrich, Executor, for Renewal in 1915	2
Death of Goodrich and Will bequeathing all property to Wife, Alice L. Goodrich, who assigned dramatic copyright to Petitioner	3
Allegations of Infringement	3
Motions to Dismiss Granted and Affirmed on Authority of Silverman *v.* Sunrise Pictures Corp.	3, 4
Section 24 Copyright Act of 1909 Set Forth.	5
Committee Reports on Renewal Provisions in Act	6
Correct Construction of Act with Reference to Case	7
History of Renewal Acts Prior to 1909	9
White-Smith Music Publishing Co. *v.* Goff, Discussed	9
Erroneous Doctrine of Silverman v. Sunrise Discussed	11
Comparison with Patent Laws not Similar..	15
If Law in Silverman *v.* Sunrise Correct, then all Classes Mentioned in Statute Obtain no Renewal Unless Author Dies within One Year Prior to the Expiration of his Copyright	17

PAGE

Correct Interpretation of Section 24 Should be that all Classes Including Executors Obtain their Renewal Rights from a Statutory grant not Dependent on when Author Dies. 19, 20

TABLE OF CASES CITED.

PAGE

D. LaVergne *v.* Featherstone, 147 U. S., 222 . . . .13, 15
Paige *v.* Banks, 13 Wall (80 U. S., 608) 9
Silverman *v.* Sunrise Pictures Corp., 273 Fed. Rep., 909 ..... 4, 5
White-Smith Publishing Co. *v.* Goff, 187 Fed. Rep., 247 9

To be argued by
SAUL E. ROGERS.

Supreme Court of the United States.

FOX FILM CORPORATION,
Petitioner,
against
FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,
Respondents.

October Term, 1922.
No. 310.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

This is an appeal pursuant to a writ of certiorari granted by this Honorable Court (Record page 28, fols. 64-69) from a decree of the Circuit Court of Appeals for the Second Circuit, affirming a final decree of the Eastern District of New York dismissing the petitioner's bill of complaint upon a motion to dismiss under

equity rule 29, in an action for infringement of the dramatic copyright of the poems entitled "OVER THE HILL TO THE POORHOUSE" and OVER THE HILL FROM THE POORHOUSE."

Statement of the Case.

The allegations of the bill of complaint were as follows:

Prior to 1873 Will Carleton was the author of a collection of poems, among which was one entitled "Over the Hill to the Poor House" and another "Over the Hill From the Poor House" (Rec. page 1, fol. 3). Carleton assigned his interest in the poems and collection, together with the right to secure copyrights thereon to Harper & Bro., publishers. On February 21, 1873 said assignees duly copyrighted said collection of poems and published the same under the title of "Farm Ballads" (Rec. p. 2, fols. 3-5).

On January 7, 1901, and within one year of the expiration of the copyrights assigned to Harper & Bro., Carleton, as author, applied for and obtained a renewal of said copyrights. The expiration of this renewal was February 21, 1915 (Rec. pp. 2-3, fol. 5).

Carleton died December 18, 1912, leaving neither wife nor children surviving him and leaving a will wherein one Norman E. Goodrich was named as executor and made sole legatee of the testator's property. Letters Testamentary were issued to Goodrich in Kings County, New York, on March 21, 1913 (Rec. p. 3, fol. 6).

On January 21, 1915, Goodrich, as executor of the will of Carleton, duly filed an application for the renewal of said copyright (Rec. p. 3, fol.

6), and which renewal, expiring February 21, 1929, was duly registered by the Register of Copyrights. All the various publications of the said collection of poems were suitably inscribed in accordance with the Copyright Law (Rec. p. 2, fol. 4).

On July 27, 1915, Norman E. Goodrich died, leaving a will in which he granted and devised all his property to his wife, Alice L. Goodrich, and named her as executrix. This will was probated and Mrs. Goodrich qualified thereunder. By instrument dated October 26, 1920, Mrs. Goodrich purported to assign to the petitioner Fox Film Corporation for a valuable consideration the sole dramatic copyrights of the above named poems with the exclusive right to dramatize the same for production throughout the world.

These poems were capable of being dramatized and lent themselves to the making of a practical and effective stage drama based on their plot and theme. Respondents in violation and in infringement of the petitioner's dramatic copyrights, purchased as aforesaid, gave public performances of a play entitled "Over the Hill to the Poor House" on October 25, 1920, and thereafter, which play was based in whole or in part on the theme, plot and action of said poems (Rec. p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

Several of the defendants, after interposing answers, made a motion to dismiss the bill of complaint pursuant to equity rule 29. The District Court granted the motion to dismiss on the ground that the petitioner and its predecessors in title Alice L. Goodrich and Norman E. Goodrich obtained no renewal of the copyright of the aforesaid poems, because Norman E. Goodrich Will Carleton's executor, had no right to apply

for a further renewal from February 21, 1915, the date of the expiration of the author's first renewal copyright, *because said author died in* 1912 *and not within one year prior to February* 21, 1915 (Rec. pp. 13-15, fols. 30-34).

The District Court held that the widow, children and next-of-kin of the author would have the right to obtain renewal of the copyright, regardless of the time of death of the author prior to the expiration thereof, so long as their renewal application was filed within one year from the expiration of the copyright; but held, notwithstanding the language of the Statute to the contrary, that an executor would not be entiled to apply for such renewal nor would the legatees under the Will be entitled to the benefits of such renewal term unless the death of the author occurred within one year prior to the expiration of the copyright.

The decision of the District Court purported to follow *Silverman* v. *Sunrise Pictures Corporation* (273 Fed., 909) decided by the Circuit Court of Appeals for the Second Circuit.

In another action involving the same copyright involved herein brought about the same time in the District Court for the Southern District of New York and on a similar motion to dismiss the District Court, in that case, made a similar decision, and by a final decree dismissed the bill of complaint (*Fox Film Corporation* v. *Knowles, et al.*, 275 Fed., 852), which action has been also brought up for review pursuant to a writ of certiorari.

Appeals from both cases were taken to the United States Circuit Court of Appeals, and by agreement of counsel were submitted and argued simultaneously. The Circuit Court of Appeals

affirmed the said final decrees of the District Court in a memorandum decision, basing its affirmance solely upon the prior decision in *Silverman* v. *Sunrise Pictures Corporation*, supra (Record p. 26, fol. 60).

POINT I.

Section 24 of the Copyright Act of 1909, the construction of which is involved on this appeal, permits the author in the absence of his widow or children to bequeath by will to an executor the absolute right to apply for a renewal of the copyright, and grants to the executor precedence over the next-of-kin.

There appears to be no ambiguity in Section 24 of the Copyright Law of 1909 with respect to the privilege of an author to bequeath by will to an executor the absolute right, in the absence of the other persons named in the statute, the widow or children, to apply for and obtain a renewal of the copyright. For convenience we set forth the pertinent part of Section 24:

> "That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or chil-

> dren of the author, if the author be not living, or if such author, widow or widower, or children be not living, then by the author's executors, or in the absence of a will, his next-of-kin, for a further period such that the entire term shall be equal to that secured by this act including the renewal period: * * * Provided, that application for such renewal and extension shall be made to the Copyright Office and to the register therein within one year prior to the expiration of the existing term."

(Section 24 of the Copyright Act of March 5th, 1909, 35 Stats., Part 1, p. 1080.)

Considerable enlightenment of the legislative intent in enacting said section is contained in the House Committee Report, Number 2222, 60th Congress on the bill afterwards enacted into the Copyright Law of 1909. After referring generally to the wisdom of a renewal of the term of a copyright, the report reads:

> "It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right." * * *

> "Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the

widow, widower, or children of the author, if the author, be not living, or if such author, widow, widower, or children be not living, *then the author's executors, or in the absence of a will, his next-of-kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.*" (Italics ours.)

Under the clear and unequivocal provisions of the Act and the further explanation by the above Committee Report it is almost incomprehensible how the Circuit Court of Appeals could interpret this statute by reading into the Act any condition or qualification of the absolute privilege of an author in the absence of his widow or children to bequeath by will the right to his executors to make an application for a renewal of the copyright.

The instant case disclosed a situation where this plain and simple construction should have been followed, as was alleged in the bill of complaint. The original copyright procured by Harper & Bro. expired in 1901. The author properly procured a renewal thereof from 1901 to 1915. The author died in 1912 without a widow or children, leaving as his executor and sole legatee one Norman E. Goodrich. The executor duly qualified and as such executor, within a year prior to the expiration of Will Carleton's copyright in 1915, duly made his application for a renewal thereof, and the Register of Copyrights registered such renewal from 1915 to 1929. By operation of law the said executor, who was also the sole legatee, received the benefit of such further renewal copyright, and

when he died on July 27, 1915, he had the absolute right to bequeath by will his property, which included the said renewal, to his widow Alice L. Goodrich, from whom the petitioner received its title to the dramatic copyright by an assignment duly executed on October 26, 1920. The chain of title is perfect and complete, and in accordance with the only possible construction of Section 24 of the Act, the petitioner, acquired by assignment, the renewal of the copyright which expires on February 21, 1929. The Bill of Complaint therefore alleges a good cause of action and it was error to dismiss the same.

POINT II.

The proposition of law upon which the instant case was decided, and as also contained in the case of *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed., 909, to wit: "That the right or duty of an executor to make an application for the renewal of a copyright exists only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease," is unsound and is not in accordance with the legislative intent.

The decision holding the renewal copyright invalid in the case at bar is based upon the

proposition held by the District Court and the Circuit Court of Appeals in the case at bar and in the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* to the effect that in the absence of the author's widow or children, the executor has no right to make an application for a renewal unless the power or privilege of obtaining such renewal was in existence in the testator-author at the moment of decease; that is to say, the author must have died within one year prior to the expiration of his or the prior copyright.

We have been unable to find any authority, nor do we believe there is any adjudicated case, with the exception of the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* and the instant case, construing the act in any such manner.

Prior to 1831 in the various copyright acts then in force the right of renewal was given to an author, his executors, administrators, and assigns, and under the specific language of those statutes it was determined in the case of *Paige* v. *Banks,* 13 Wall. (80 U. S., 608), that an author who had assigned all his right, title and interest in and to a literary property thereby also impliedly assigned the right of renewal.

In 1831 the law was amended by eliminating the word "Assigns" from the statute and making the provision with respect to the renewal of copyrights substantially the same as contained in Section 24 of the present Copyright Act of 1909.

The case of *White-Smith Music Publishing Co.* v. *Goff,* 187 Fed., 247, affirming 180 Fed., 256 decided in 1911, and construing Section 24 of the Copyright Act of 1909, we believe correctly held that the case of *Paige* v. *Banks, supra,* was no longer applicable to the present statute and such

case established the proposition that an author or composer by assigning all his rights in and to a musical or literary work did not and could not assign the right of renewal; that such renewal right was *eo nomine* and limited strictly to the persons mentioned in the statute. In its discussion of Section 24 the Court gives a careful, learned and exhaustive opinion with reference to the general purport and effect of the renewal provisions of the Act, and in discussing the rights of executors under said statute says as follows (p. 251):

> "In every Act since that of 1831 this method of vesting the right to an extension *eo nomine* has been persisted in. The purpose of these provisions is singularly illustrated by the fact that all the author's administrators are shut out; but his executors who he may appoint at his will are let in."

That case, we believe, correctly establishes in theory at least that the renewal of a copyright is not truly an extension of an existing right, but is the creation of a new right derived only from the statutes and limited to the persons mentioned therein and in their order, providing proper application is made by the persons entitled to same for such renewal. No limitations or conditions are mentioned therein as to the right of executors to make application for a renewal of a copyright in the absence of the author's widow or children, and it would appear from that decision, although the precise quesiton was not adjudicated, that if there were no widow or children the executor, being the next

person mentioned in the statute, would have the absolute prior right to apply for such renewal and obtain the benefits thereof necessarily in trust for the legatees named in the author's will.

It is difficult to understand how the learned District Court and the learned Circuit Court of Appeals in the instant case and in the case of *Silverman* vs. *Sunrise Pictures Corporation, supra,* established the proposition that an executor could not make an application for a renewal of the copyright unless the power or privilege of obtaining the renewal was existing in the testator-author at the moment of his decease, *i. e.*, that it was dependent on the accident of the time of the author's death.

The facts in the *Silverman case* were entirely different from the facts in the instant case. In the *Silverman case* no application was made by the executor for a renewal of the copyright within the year prior to the expiration of the author's copyright. He had been discharged and ceased to function and had failed to make such application. An application, however, was made within the year prior to the expiration of the copyright by some of the next-of-kin and the learned Circuit Court of Appeals in the *Silverman case* held that the next-of-kin had obtained a valid copyright.

We are not concerned with any of the propositions discussed and litigated in the *Silverman case* except in one proposition stated by the Court to be as follows at page 913:

> "Result is that we construe the section as vesting the right in, or imposing the duty on executors, only when the power or privi-

lege of obtaining renewal was existing in the testator-author at the moment of decease."

This proposition was followed by the learned Circuit Court of Appeals in its affirmance of the decree of the District Court in the instant case.

It is very difficult to follow the reasoning of the learned Circuit Court of Appeals in arriving at this interpretation of the statute. It is submitted that there is nothing in the act or in the design or purpose thereof as expressed by the report of the Committee of the House of Representatives heretofore set forth or in the case of *White-Smith Music Publishing Co.* v. *Goff*, *supra*, interpreting generally said statute, to warrant, we believe, any such interpretation with respect to the rights of executors to apply for a renewal of a copyright.

That a misapprehension and confusion of the entire subject has arisen, is evidenced by the following excerpts from the opinion of the learned Circuit Court of Appeals in the *Silverman case*. The Court, at page 913, says:

> "It is plain from the language of the Act and from the design and purpose thereof as expressed by congressional committee and recognized by courts, that the author cannot take away the rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated— a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right *eo nomine*, which is

exactly what the statute was designed to prevent."

The Court in that paragraph was discussing only the absolute rights of the widow or children to apply for a renewal of the copyright and that the author could not grant to his publisher the right to obtain the renewal and thereby deprive his widow or children of that right. No mention is made of the author's executors and up to this point the law expressed therein is undoubtedly correct, because in any event in accordance with the statute, if there were a widow or children, the executor would never have any right to renew a copyright. The Court then continuing in its opinion, says, on page 913:

"But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

"If however, the author lives to within the statutory year he may certainly exercise his right, assign it or bequeath it; and if he dies in the year, but before registration, it is for his executors to function. They would receive the renewal as do the executors of an inventor dying after application and before issue of patent, who, 'in the absence of context to the contrary' take 'in trust for the next of kin' (*De La Vergne & Co.* v. *Featherstone,* 147 U. S., at 222.) In this case had Mrs. Wilson died within the year her executors would have found 'con-

text to the contrary', and would have acquired copyright for the residuary legatees as such."

We think that the comparison stated by the Court between the rights which may not be assigned under Section 24 of the Copyright Law and the rights that may be bequeathed are not correctly placed on the same level, nor are they at all comparable. While it is true "What may be assigned can ordinarily be devised", it does not necessarily follow that the rights are governed by the same procedure or principles. In other words, while it is true that provision for the assignment of a renewal term has been specifically excluded from the present statute before the right to accrual of the renewal estate yet this statute specifically permits the author to bequeath the right to make application for the renewal term, provided that no widow or children survive. The learned Circuit Court of Appeals in construing the statute in the *Silverman case* treated executors as though they were not specifically mentioned in the statute or as though they had been specifically excluded in the same manner that "Assigns" had previously been stricken from the Act of 1831, and the subsequent acts.

In view of the fact, however, that the statute specifically provides that the right to renewal may be bequeathed to executors necessarily to be held in trust for the benefit of the legatees, and inasmuch as the statute gives such executor precedence over the next of kin, there seems to be no reason why the learned Circuit Court of Appeals should strip the executors of the specific rights granted by the statute, except upon the

happening of an event not named in the statute, that is, the death of the author within one year prior to expiration of his copyright.

POINT III.

The comparison by the Circuit Court of Appeals in the *Silverman case* to the granting of a patent to the executor or administrator after application for a patent has been made is not at all similar to the situation in the instant case.

The comparison by the Circuit Court of Appeals to the patent laws is in no sense analogous. The Court refers to the case of *De La Vergne Co.* vs. *Featherstone,* 147 U. S., 222.

In that case an entirely different situation existed. It is provided by Section 4896 of the Revised Statutes that whenever a person makes application for letters patent and dies before their issuance, as follows:

> "When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the

heirs at law of the deceased, in case he shall have died intestate; or if he shall have left a will, disposing of the same, then in trust for his devisees, in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime; and when the application is made by such legal representatives, the oath of affirmation required to be made shall be so varied in form that it can be made by them."

Under this section, and which was the one referred to in the case of *De La Vergne* v. *Featherstone, supra,* if the inventor dies before his letters patent are granted his executors or administrators may obtain the final letters patent. The right of the executors or administrators to succeed the inventor in trust for the heirs at law in the event of his death, pending grant of letters patent, is specifically granted by the Patent Laws, and in that respect the Courts strictly and religiously adhere to the language of the statute. In the case at bar and in *Silverman* vs. *Sunrise Pictures Corporation, supra,* in spite of the fact that the statute grants rights to executors to apply for a renewal the Circuit Court of Appeals has made an interpretation which entirely eliminates the statutory intent.

POINT IV.

If the interpretation in the instant case and *Silverman case* is correct with reference to the executor's right to obtain a renewal, the same interpretation should be made with respect to the other persons and classes mentioned in the statute.

If the proposition advanced in the *Silverman case* and in the instant case with reference to executors must be followed, to wit, that the right to apply for a renewal of the copyright exists only when the author died within one year prior to the expiration of his copyright, then the rule must be similarly and consistently applied to the widow and children and next of kin of the author; otherwise the entire structure falls. If the executor has no capacity to apply for the renewal term unless that right came into being and was in existence at the time of the death of the testator, then it must equally follow that the widow and children could not apply for the renewal term unless the decedent likewise died within one year prior to the expiration of the original copyright term, and similar reasoning should certainly apply to the next-of-kin, because they are the last class mentioned in the statute and their rights are only to be asserted under the statute in the absence of all the other classes surviving the author.

The reasons for the decision in the *Silverman case* and in the present case that executors do not acquire any renewal rignts until the beginning of the year last preceding the expiration of the copyright, either apply with equal force to the widow and children of the author and prevent these classes of persons from acquiring any renewal rights unless through the accident of the author's death within the prescribed year; or the reasons for these decisions are not sufficient to deprive executors situated as in the present case, of these rights. In the *Silverman case* the court said:

> "* * * We construe the section as vesting the right in, or imposing the duty on, executors only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease."

If this be true of executors it is equally true of the widow of the author or his children. The court then continues:

> "It is consequently held here that, since this renewal right did not exist, it was not affected by the will or the appointment of executors; in short, there was a necessary absence of a will in respect of this right, which only came into existence some five years after the testatrix died."

If this renewal right is not capable of passing by will to the executors unless within the prescribed year, neither does it pass to the widow or the children of the author, and it follows that these persons likewise have no rights unless death occurs within a year prior to the expira-

tion of the copyright. In spite of this fact, however, the court bases its decision that a testator-author cannot devise his renewal rights unless within the prescribed year upon the reason, quoted again from the *Silverman case* that:

> "The author cannot take away the rights of widow, children, before the opening of the last year of original copyright."

Logically, as seen above, this argument is without force for the reason that widow and children, being on a par in the wording of the statute with executors, have no greater rights than executors have within the meaning of this decision until the beginning of the prescribed year. If, to these arguments, it be answered that the widow and children receive the right to renewal not in any way through the author but by a pure statutory grant upon the beginning of the year, it may be answered that executors being enumerated with widows and children in the statute, likewise receive the renewal rights at the prescribed time, the only condition being that the widow and children are preferred in their order. The decision in the *Silverman case* and in the present case, in the end, comes to this:

> (1) Either, executors along with the widows and children of authors have an inchoate right to renewal upon the death of the author, which right, however, can only be exercised at the beginning of the prescribed year, or;
>
> (2) Executors as well as the other classes enumerated receive renewal rights by statutory grant at the beginning of the year prior to the expiration of the copyright, or;

(3) Congress, in its zeal to secure to authors, their widows, and children the benefit of renewal rights, has enacted a statute which will operate to deprive them entirely of these rights unless upon the accident of the author dying within the year preceding the expiration of the copyright.

It follows logically from the above that the only proper construction of Sec. 24 of the Copyright Act is that which, following the plain language of the statute itself, gives to widows and children of authors, or if they are not living, to the executor of the author a renewal right at the time of his death, even though by a proviso in Section 24, this right cannot be exercised until the beginning of the year previous to the expiration of the copyright.

POINT V.

It is respectfully submitted that the correct interpretation of Section 24 of the Copyright Act requires a reversal of the decree of the Circuit Court of Appeals and the District Court dismissing the bill of complaint; that such decrees be set aside and vacated with costs.

Respectfully submitted,

SAUL E. ROGERS,
Attorney for Petitioner.

Supreme Court of the United States

October Term, 1922.

No. 311

FOX FILM CORPORATION,

Petitioner,

against

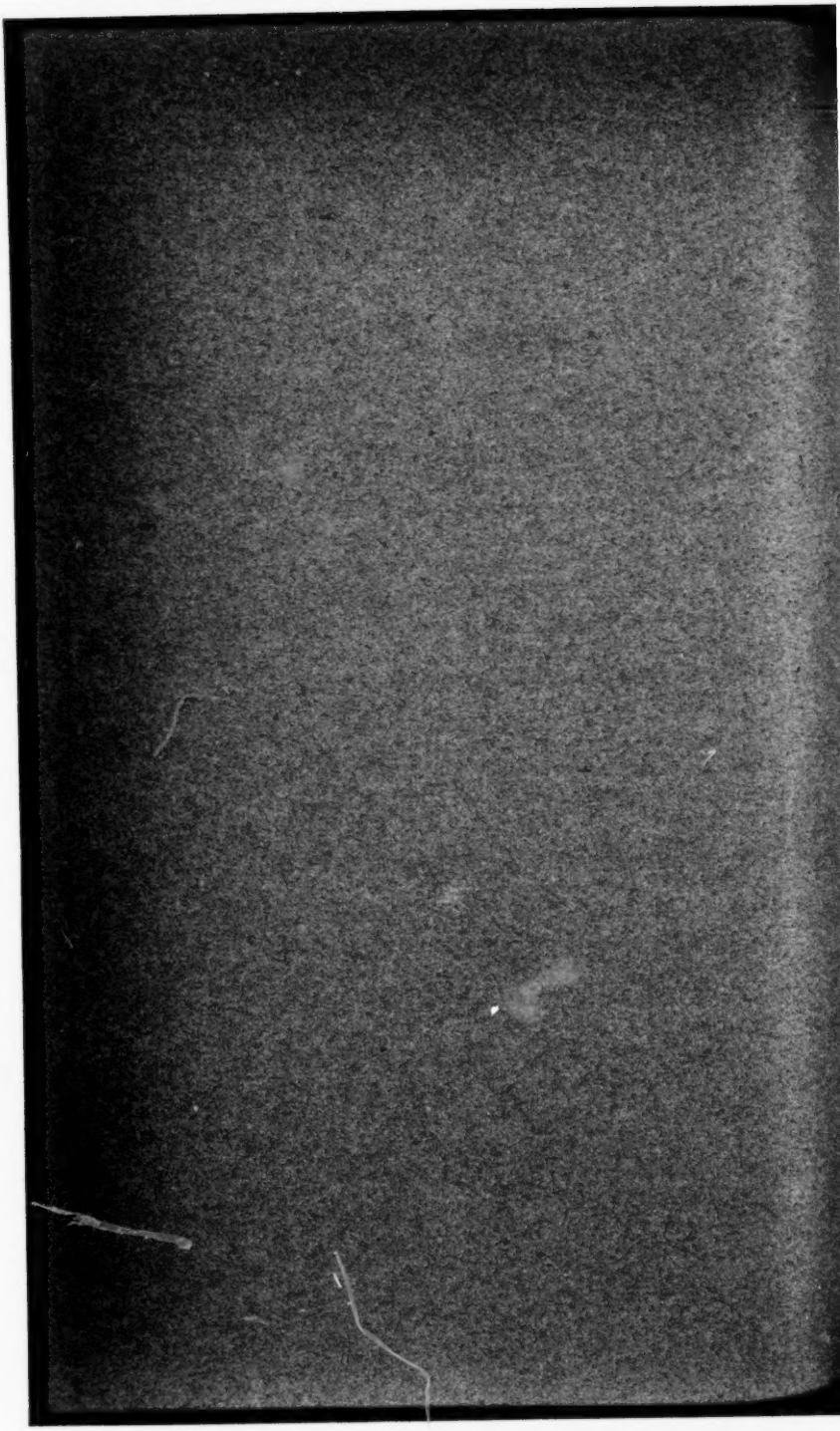
FREDERICK M. KNOWLES, WILLIAM McWATTERS, &c., HARRY MEYERS, JOSEPH S. KLEIN,

Respondents.

On Writ to Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PETITIONER'S BRIEF.

Louis D. Frohman,
Attorney for Petitioner.



INDEX.

	PAGE
Copyright of Poems by Harper & Bro., 1873	2
Renewal Application by Author in 1901	2
Death of Author in 1912	2
Application by Goodrich, Executor, for Renewal in 1915	2
Death of Goodrich and Will bequeathing all property to Wife, Alice L. Goodrich, who assigned dramatic copyright to Petitioner	3
Allegations of Infringement	3
Motions to Dismiss Granted and Affirmed on Authority of Silverman *v.* Sunrise Pictures Corp.	3, 4
Section 24 Copyright Act of 1909 Set Forth.	5
Committee Reports on Renewal Provisions in Act	6
Correct Construction of Act with Reference to Case	7
History of Renewal Acts Prior to 1909	9
White-Smith Music Publishing Co. *v.* Goff, Discussed	9
Erroneous Doctrine of Silverman v. Sunrise Discussed	11
Comparison with Patent Laws not Similar..	15
If Law in Silverman *v.* Sunrise Correct, then all Classes Mentioned in Statute Obtain no Renewal Unless Author Dies within One Year Prior to the Expiration of his Copyright	17

PAGE

Correct Interpretation of Section 24 Should be that all Classes Including Executors Obtain their Renewal Rights from a Statutory grant not Dependent on when Author Dies. 19, 20

Table of Cases Cited.

PAGE

D. LaVergne *v.* Featherstone, 147 U. S., 222 . . . .13, 15
Paige *v.* Banks, 13 Wall (80 U. S., 608) 9
Silverman *v.* Sunrise Pictures Corp., 273 Fed. Rep., 909 ..... 4, 5
White-Smith Publishing Co. *v.* Goff, 187 Fed. Rep., 247 9

To be argued by
SAUL E. ROGERS.

Supreme Court of the United States.

FOX FILM CORPORATION, Petitioner, against FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS, &c.; HARRY MEYERS, and JOSEPH S. KLEIN, Respondents.	October Term, 1922. No. 311.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

This is an appeal pursuant to a writ of certiorari granted by this Honorable Court (Record pages 30-31, fols. 69-72) from a decree of the Circuit Court of Appeals for the Second Circuit, affirming a final decree of the Southern District of New York dismissing the petitioner's bill of complaint upon a motion to dismiss under

equity rule 29, in an action for infringement of the dramatic copyright of the poems entitled "OVER THE HILL TO THE POORHOUSE" and OVER THE HILL FROM THE POORHOUSE."

Statement of the Case.

The allegations of the bill of complaint were as follows:

Prior to 1873 Will Carleton was the author of a collection of poems, among which was one entitled "Over the Hill to the Poor House" and another "Over the Hill From the Poor House" (Rec. page 1, fol. 3). Carleton assigned his interest in the poems and collection, together with the right to secure copyrights thereon to Harper & Bro., publishers. On February 21, 1873 said assignees duly copyrighted said collection of poems and published the same under the title of "Farm Ballads" (Rec. p. 2, fols. 3-5).

On January 7, 1901, and within one year of the expiration of the copyrights assigned to Harper & Bro., Carleton, as author, applied for and obtained a renewal of said copyrights. The expiration of this renewal was February 21, 1915 (Rec. pp. 2-3, fol. 5).

Carleton died December 18, 1912, leaving neither wife nor children surviving him and leaving a will wherein one Norman E. Goodrich was named as executor and made sole legatee of the testator's property. Letters Testamentary were issued to Goodrich in Kings County, New York, on March 21, 1913 (Rec. p. 3, fol. 6).

On January 21, 1915, Goodrich, as executor of the will of Carleton, duly filed an application for the renewal of said copyright (Rec. p. 3, fol.

6), and which renewal, expiring February 21, 1929, was duly registered by the Register of Copyrights. All the various publications of the said collection of poems were suitably inscribed in accordance with the Copyright Law (Rec. p. 2, fol. 4).

On July 27, 1915, Norman E. Goodrich died, leaving a will in which he granted and devised all his property to his wife, Alice L. Goodrich, and named her as executrix. This will was probated and Mrs. Goodrich qualified thereunder. By instrument dated October 26, 1920, Mrs. Goodrich purported to assign to the petitioner Fox Film Corporation for a valuable consideration the sole dramatic copyrights of the above named poems with the exclusive right to dramatize the same for production throughout the world.

These poems were capable of being dramatized and lent themselves to the making of a practical and effective stage drama based on their plot and theme. Respondents in violation and in infringement of the petitioner's dramatic copyrights, purchased as aforesaid, gave public performances of a play entitled "Over the Hill to the Poor House" on October 25, 1920, and thereafter, which play was based in whole or in part on the theme, plot and action of said poems (Rec. p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

Several of the defendants, after interposing answers, made a motion to dismiss the bill of complaint pursuant to equity rule 29. The District Court granted the motion to dismiss on the ground that the petitioner and its predecessors in title Alice L. Goodrich and Norman E. Goodrich obtained no renewal of the copyright of the aforesaid poems, because Norman E. Goodrich Will Carleton's executor, had no right to apply

for a further renewal from February 21, 1915, the date of the expiration of the author's first renewal copyright, *because said author died in* 1912 *and not within one year prior to February* 21, 1915 (Record pp. 10-13, fols. 24-29).

The District Court held that the widow, children and next-of-kin of the author would have the right to obtain renewal of the copyright, regardless of the time of death of the author prior to the expiration thereof, so long as their renewal application was filed within one year from the expiration of the copyright; but held, notwithstanding the language of the Statute to the contrary, that an executor would not be entiled to apply for such renewal nor would the legatees under the Will be entitled to the benefits of such renewal term unless the death of the author occurred within one year prior to the expiration of the copyright.

The decision of the District Court purported to follow *Silverman* v. *Sunrise Pictures Corporation* (273 Fed., 909) decided by the Circuit Court of Appeals for the Second Circuit.

In another action involving the same copyright involved herein brought about the same time in the District Court for the Eastern District of New York and on a similar motion to dismiss the District Court, in that case, made a similar decision, and by a final decree dismissed the bill of complaint (*Fox Film Corporation* v. *Knowles, et al.*, 274. Fed., 731), which action has been also brought up for review pursuant to a writ of certiorari.

Appeals from both cases were taken to the United States Circuit Court of Appeals, and by agreement of counsel were submitted and argued simultaneously. The Circuit Court of Appeals

affirmed the said final decrees of the District Court in a memorandum decision, basing its affirmance solely upon the prior decision in *Silverman* v. *Sunrise Pictures Corporation*, supra (Record p. 29, fol. 65.)

POINT I.

Section 24 of the Copyright Act of 1909, the construction of which is involved on this appeal, permits the author in the absence of his widow or children to bequeath by will to an executor the absolute right to apply for a renewal of the copyright, and grants to the executor precedence over the next-of-kin.

There appears to be no ambiguity in Section 24 of the Copyright Law of 1909 with respect to the privilege of an author to bequeath by will to an executor the absolute right, in the absence of the other persons named in the statute, the widow or children, to apply for and obtain a renewal of the copyright. For convenience we set forth the pertinent part of Section 24:

> "That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or chil-

dren of the author, if the author be not living, or if such author, widow or widower, or children be not living, then by the author's executors, or in the absence of a will, his next-of-kin, for a further period such that the entire term shall be equal to that secured by this act including the renewal period: * * * Provided, that application for such renewal and extension shall be made to the Copyright Office and to the register therein within one year prior to the expiration of the existing term."

(Section 24 of the Copyright Act of March 5th, 1909, 35 Stats., Part 1, p. 1080.)

Considerable enlightenment of the legislative intent in enacting said section is contained in the House Committee Report, Number 2222, 60th Congress on the bill afterwards enacted into the Copyright Law of 1909. After referring generally to the wisdom of a renewal of the term of a copyright, the report reads:

"It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right." * * *

"Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the

> widow, widower, or children of the author, if the author, be not living, or if such author, widow, widower, or children be not living, *then the author's executors, or in the absence of a will, his next-of-kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.*" (Italics ours.)

Under the clear and unequivocal provisions of the Act and the further explanation by the above Committee Report it is almost incomprehensible how the Circuit Court of Appeals could interpret this statute by reading into the Act any condition or qualification of the absolute privilege of an author in the absence of his widow or children to bequeath by will the right to his executors to make an application for a renewal of the copyright.

The instant case disclosed a situation where this plain and simple construction should have been followed, as was alleged in the bill of complaint. The original copyright procured by Harper & Bro. expired in 1901. The author properly procured a renewal thereof from 1901 to 1915. The author died in 1912 without a widow or children, leaving as his executor and sole legatee one Norman E. Goodrich. The executor duly qualified and as such executor, within a year prior to the expiration of Will Carleton's copyright in 1915, duly made his application for a renewal thereof, and the Register of Copyrights registered such renewal from 1915 to 1929. By operation of law the said executor, who was also the sole legatee, received the benefit of such further renewal copyright, and

when he died on July 27, 1915, he had the absolute right to bequeath by will his property, which included the said renewal, to his widow Alice L. Goodrich, from whom the petitioner received its title to the dramatic copyright by an assignment duly executed on October 26, 1920. The chain of title is perfect and complete, and in accordance with the only possible construction of Section 24 of the Act, the petitioner, acquired by assignment, the renewal of the copyright which expires on February 21, 1929. The Bill of Complaint therefore alleges a good cause of action and it was error to dismiss the same.

POINT II.

The proposition of law upon which the instant case was decided, and as also contained in the case of *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed., 909, to wit: "That the right or duty of an executor to make an application for the renewal of a copyright exists only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease," is unsound and is not in accordance with the legislative intent.

The decision holding the renewal copyright invalid in the case at bar is based upon the

proposition held by the District Court and the Circuit Court of Appeals in the case at bar and in the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* to the effect that in the absence of the author's widow or children, the executor has no right to make an application for a renewal unless the power or privilege of obtaining such renewal was in existence in the testator-author at the moment of decease; that is to say, the author must have died within one year prior to the expiration of his or the prior copyright.

We have been unable to find any authority, nor do we believe there is any adjudicated case, with the exception of the case of *Silverman* v. *Sunrise Pictures Corporation, supra,* and the instant case, construing the act in any such manner.

Prior to 1831 in the various copyright acts then in force the right of renewal was given to an author, his executors, administrators, and assigns, and under the specific language of those statutes it was determined in the case of *Paige* v. *Banks,* 13 Wall. (80 U. S., 608), that an author who had assigned all his right, title and interest in and to a literary property thereby also impliedly assigned the right of renewal.

In 1831 the law was amended by eliminating the word "Assigns" from the statute and making the provision with respect to the renewal of copyrights substantially the same as contained in Section 24 of the present Copyright Act of 1909.

The case of *White-Smith Music Publishing Co.* v. *Goff,* 187 Fed., 247, affirming 180 Fed., 256 decided in 1911, and construing Section 24 of the Copyright Act of 1909, we believe correctly held that the case of *Paige* v. *Banks, supra,* was no longer applicable to the present statute and such

case established the proposition that an author or composer by assigning all his rights in and to a musical or literary work did not and could not assign the right of renewal; that such renewal right was *eo nomine* and limited strictly to the persons mentioned in the statute. In its discussion of Section 24 the Court gives a careful, learned and exhaustive opinion with reference to the general purport and effect of the renewal provisions of the Act, and in discussing the rights of executors under said statute says as follows (p. 251):

> "In every Act since that of 1831 this method of vesting the right to an extension *eo nomine* has been persisted in. The purpose of these provisions is singularly illustrated by the fact that all the author's administrators are shut out; but his executors who he may appoint at his will are let in."

That case, we believe, correctly establishes in theory at least that the renewal of a copyright is not truly an extension of an existing right, but is the creation of a new right derived only from the statutes and limited to the persons mentioned therein and in their order, providing proper application is made by the persons entitled to same for such renewal. No limitations or conditions are mentioned therein as to the right of executors to make application for a renewal of a copyright in the absence of the author's widow or children, and it would appear from that decision, although the precise quesiton was not adjudicated, that if there were no widow or children the executor, being the next

person mentioned in the statute, would have the absolute prior right to apply for such renewal and obtain the benefits thereof necessarily in trust for the legatees named in the author's will.

It is difficult to understand how the learned District Court and the learned Circuit Court of Appeals in the instant case and in the case of *Silverman* vs. *Sunrise Pictures Corporation, supra,* established the proposition that an executor could not make an application for a renewal of the copyright unless the power or privilege of obtaining the renewal was existing in the testator-author at the moment of his decease, *i. e.*, that it was dependent on the accident of the time of the author's death.

The facts in the *Silverman case* were entirely different from the facts in the instant case. In the *Silverman case* no application was made by the executor for a renewal of the copyright within the year prior to the expiration of the author's copyright. He had been discharged and ceased to function and had failed to make such application. An application, however, was made within the year prior to the expiration of the copyright by some of the next-of-kin and the learned Circuit Court of Appeals in the *Silverman case* held that the next-of-kin had obtained a valid copyright.

We are not concerned with any of the propositions discussed and litigated in the *Silverman case* except in one proposition stated by the Court to be as follows at page 913:

> "Result is that we construe the section as vesting the right in, or imposing the duty on executors, only when the power or privi-

> lege of obtaining renewal was existing in the testator-author at the moment of decease."

This proposition was followed by the learned Circuit Court of Appeals in its affirmance of the decree of the District Court in the instant case.

It is very difficult to follow the reasoning of the learned Circuit Court of Appeals in arriving at this interpretation of the statute. It is submitted that there is nothing in the act or in the design or purpose thereof as expressed by the report of the Committee of the House of Representatives heretofore set forth or in the case of *White-Smith Music Publishing Co.* v. *Goff*, *supra*, interpreting generally said statute, to warrant, we believe, any such interpretation with respect to the rights of executors to apply for a renewal of a copyright.

That a misapprehension and confusion of the entire subject has arisen, is evidenced by the following excerpts from the opinion of the learned Circuit Court of Appeals in the *Silverman case*. The Court, at page 913, says:

> "It is plain from the language of the Act and from the design and purpose thereof as expressed by congressional committee and recognized by courts, that the author cannot take away the rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated— a new estate, not a true extension of the existing copyright. If it were otherwise, the author could grant to his first publisher the renewal right ***eo nomine***, which is

exactly what the statute was designed to prevent."

The Court in that paragraph was discussing only the absolute rights of the widow or children to apply for a renewal of the copyright and that the author could not grant to his publisher the right to obtain the renewal and thereby deprive his widow or children of that right. No mention is made of the author's executors and up to this point the law expressed therein is undoubtedly correct, because in any event in accordance with the statute, if there were a widow or children, the executor would never have any right to renew a copyright. The Court then continuing in its opinion, says, on page 913:

"But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

"If however, the author lives to within the statutory year he may certainly exercise his right, assign it or bequeath it; and if he dies in the year, but before registration, it is for his executors to function. They would receive the renewal as do the executors of an inventor dying after application and before issue of patent, who, 'in the absence of context to the contrary' take 'in trust for the next of kin' (*De La Vergne & Co.* v. *Featherstone*, 147 U. S., at 222.) In this case had Mrs. Wilson died within the year her executors would have found 'con-

> text to the contrary', and would have acquired copyright for the residuary legatees as such."

We think that the comparison stated by the Court between the rights which may not be assigned under Section 24 of the Copyright Law and the rights that may be bequeathed are not correctly placed on the same level, nor are they at all comparable. While it is true "What may be assigned can ordinarily be devised", it does not necessarily follow that the rights are governed by the same procedure or principles. In other words, while it is true that provision for the assignment of a renewal term has been specifically excluded from the present statute before the right to accrual of the renewal estate yet this statute specifically permits the author to bequeath the right to make application for the renewal term, provided that no widow or children survive. The learned Circuit Court of Appeals in construing the statute in the *Silverman case* treated executors as though they were not specifically mentioned in the statute or as though they had been specifically excluded in the same manner that "Assigns" had previously been stricken from the Act of 1831, and the subsequent acts.

In view of the fact, however, that the statute specifically provides that the right to renewal may be bequeathed to executors necessarily to be held in trust for the benefit of the legatees, and inasmuch as the statute gives such executor precedence over the next of kin, there seems to be no reason why the learned Circuit Court of Appeals should strip the executors of the specific rights granted by the statute, except upon the

happening of an event not named in the statute, that is, the death of the author within one year prior to expiration of his copyright.

POINT III.

The comparison by the Circuit Court of Appeals in the *Silverman case* to the granting of a patent to the executor or administrator after application for a patent has been made is not at all similar to the situation in the instant case.

The comparison by the Circuit Court of Appeals to the patent laws is in no sense analogous. The Court refers to the case of *De La Vergne Co.* vs. *Featherstone,* 147 U. S., 222.

In that case an entirely different situation existed. It is provided by Section 4896 of the Revised Statutes that whenever a person makes application for letters patent and dies before their issuance, as follows:

> "When any person, having made any new invention or discovery for which a patent might have been granted, dies before a patent is granted, the right of applying for and obtaining the patent shall devolve on his executor or administrator, in trust for the

heirs at law of the deceased, in case he shall have died intestate; or if he shall have left a will, disposing of the same, then in trust for his devisees, in as full manner and on the same terms and conditions as the same might have been claimed or enjoyed by him in his lifetime; and when the application is made by such legal representatives, the oath of affirmation required to be made shall be so varied in form that it can be made by them."

Under this section, and which was the one referred to in the case of *De La Vergne* v. *Featherstone, supra,* if the inventor dies before his letters patent are granted his executors or administrators may obtain the final letters patent. The right of the executors or administrators to succeed the inventor in trust for the heirs at law in the event of his death, pending grant of letters patent, is specifically granted by the Patent Laws, and in that respect the Courts strictly and religiously adhere to the language of the statute. In the case at bar and in *Silverman* vs. *Sunrise Pictures Corporation, supra,* in spite of the fact that the statute grants rights to executors to apply for a renewal the Circuit Court of Appeals has made an interpretation which entirely eliminates the statutory intent.

POINT IV.

If the interpretation in the instant case and *Silverman case* is correct with reference to the executor's right to obtain a renewal, the same interpretation should be made with respect to the other persons and classes mentioned in the statute.

If the proposition advanced in the *Silverman case* and in the instant case with reference to executors must be followed, to wit, that the right to apply for a renewal of the copyright exists only when the author died within one year prior to the expiration of his copyright, then the rule must be similarly and consistently applied to the widow and children and next of kin of the author; otherwise the entire structure falls. If the executor has no capacity to apply for the renewal term unless that right came into being and was in existence at the time of the death of the testator, then it must equally follow that the widow and children could not apply for the renewal term unless the decedent likewise died within one year prior to the expiration of the original copyright term, and similar reasoning should certainly apply to the next-of-kin, because they are the last class mentioned in the statute and their rights are only to be asserted under the statute in the absence of all the other classes surviving the author.

The reasons for the decision in the *Silverman case* and in the present case that executors do not acquire any renewal rignts until the beginning of the year last preceding the expiration of the copyright, either apply with equal force to the widow and children of the author and prevent these classes of persons from acquiring any renewal rights unless through the accident of the author's death within the prescribed year; or the reasons for these decisions are not sufficient to deprive executors situated as in the present case, of these rights. In the *Silverman case* the court said:

> "• • • We construe the section as vesting the right in, or imposing the duty on, executors only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease."

If this be true of executors it is equally true of the widow of the author or his children. The court then continues:

> "It is consequently held here that, since this renewal right did not exist, it was not affected by the will or the appointment of executors; in short, there was a necessary absence of a will in respect of this right, which only came into existence some five years after the testatrix died."

If this renewal right is not capable of passing by will to the executors unless within the prescribed year, neither does it pass to the widow or the children of the author, and it follows that these persons likewise have no rights unless death occurs within a year prior to the expira-

tion of the copyright. In spite of this fact, however, the court bases its decision that a testator-author cannot devise his renewal rights unless within the prescribed year upon the reason, quoted again from the *Silverman case* that:

> "The author cannot take away the rights of widow, children, before the opening of the last year of original copyright."

Logically, as seen above, this argument is without force for the reason that widow and children, being on a par in the wording of the statute with executors, have no greater rights than executors have within the meaning of this decision until the beginning of the prescribed year. If, to these arguments, it be answered that the widow and children receive the right to renewal not in any way through the author but by a pure statutory grant upon the beginning of the year, it may be answered that executors being enumerated with widows and children in the statute, likewise receive the renewal rights at the prescribed time, the only condition being that the widow and children are preferred in their order. The decision in the *Silverman case* and in the present case, in the end, comes to this:

> (1) Either, executors along with the widows and children of authors have an inchoate right to renewal upon the death of the author, which right, however, can only be exercised at the beginning of the prescribed year, or;
>
> (2) Executors as well as the other classes enumerated receive renewal rights by statutory grant at the beginning of the year prior to the expiration of the copyright, or;

(3) Congress, in its zeal to secure to authors, their widows, and children the benefit of renewal rights, has enacted a statute which will operate to deprive them entirely of these rights unless upon the accident of the author dying within the year preceding the expiration of the copyright.

It follows logically from the above that the only proper construction of Sec. 24 of the Copyright Act is that which, following the plain language of the statute itself, gives to widows and children of authors, or if they are not living, to the executor of the author a renewal right at the time of his death, even though by a proviso in Section 24, this right cannot be exercised until the beginning of the year previous to the expiration of the copyright.

POINT V.

It is respectfully submitted that the correct interpretation of Section 24 of the Copyright Act requires a reversal of the decree of the Circuit Court of Appeals and the District Court dismissing the bill of complaint; that such decrees be set aside and vacated with costs.

Respectfully submitted,

SAUL E. ROGERS,
Attorney for Petitioner.

Office Supreme Court, U.
FILED
OCT 6 1922
WM. R. STANSBU
CLER

Supreme Court,

OF THE UNITED STATES.

FOX FILM CORPORATION,
Petitioner,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,
Respondents.

October Term, 1922
No. 310

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

LOUIS R. BICK,
Solicitor for Respondent.

Printed by LIBMAN'S LAW PRINTERY, 120 PARK ROW, NEW YORK

INDEX.

	PAGE
Copyright of poems by Harper & Bros. 1873	2
Renewal of Application by author in 1901	2
Death of author in 1912	2
Application by executor for renewal in 1915	3
Death of Goodrich and will beqeathing all his property to his wife, Alice L. Goodrich, who assigned her rights to petitioner	3
Allegations of infringement	3
Motion to dismiss granted and affirmed	4
Section 24 of the Copyright Act	5
Quotaton from Judge Knox's opinion in present case	6
Answer to petitioner's argument that the lower court misconstrued the act	7
Reason for the insertion of word "executor" in Act	8
Discussion of White-Smith vs. Goff case	9
Similarity of ruling in White-Smith case and Silverman case	10

TABLE OF CASES CITED:

	PAGE
Silverman vs. Sunrise Pictures corp. 273 Fed. 909	4
White-Smith Pub. Co. vs. Goff, 187 Fed. 247	9

To be argued by
LOUIS R. BICK.

Supreme Court,

OF THE UNITED STATES.

FOX FILM CORPORATION,
Petitioner,

vs.

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,
Respondents.

October Term, 1922
No. 310

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

This is an appeal pursuant to a writ of certiorari granted by this Honorable Court from an order of the Circuit Court of Appeals for the Second Circuit, affirming a final decree of the Eastern District of New York, dismissing the petitioner's bill of complaint upon a motion to dismiss under Equity Rule 29 in an action for infringement of a copyright.

Statement.

The bill of complaint alleges that prior to February 1st, 1873, one Will Carleton wrote a series of poems entitled "Farm Ballads", which contained among other things two certain poems entitled "Over the Hills to the Poorhouse" and "Over the Hills from the Poorhouse" (Rec., p. 1, fol. 3).

That prior to the 21st day of February, 1873, Will Carleton assigned said series of poems entitled "Farm Ballads" including the two poems aforementioned and his literary properties therein, including all his rights therein and the right to secure copyright therefor, to Harper & Bros.

That on or about the 21st day of February, 1873, Harper & Bros. copyrighted the two poems aforementioned (Rec., p. 2, fols. 3-5).

That within one year before the expiration of the copyright obtained by Harper & Bros. and on the 7th day of January, 1901, Will Carleton filed an application with the Register of copyrights for the renewal of said copyright, and on the 7th day of January, 1901, said copyright was renewed from the 21st day of February, 1901, for a period of fourteen years to and including February 21st, 1915 (Rec., pp. 2-3, fol. 5).

That prior to the expiration of this renewal period and in 1912, *Will Carleton died leaving a will naming Norman E. Goodrich as his sole legatee and nominating him as his executor* (Rec. p. 3, fol. 6).

That within one year before the expiration of the renewal of this copyright, heretofore obtained by Will Carleton, and *three years after the death*

of Will Carleton, Norman E. Goodrich as executor and sole legatee of the Estate of Will Carleton on or about the 21st day of February, 1915, *filed an application for the renewal of said copyright of the said copyright and the said copyright was again renewed from February 21st,* 1915, *for a further period of fourteen years to and including the 21st day of February,* 1929 (Rec., p. 3, fol. 6).

That thereafter and in July, 1915, Norman E. Goodrich died leaving a will in which he made Alice L. Goodrich, his wife, his sole legatee and nominated her as his executrix.

That on the 20th day of October, 1920, Alice L. Goodrich as executrix and sole legatee of the Estate of Norman E. Goodrich, deceased, executed what purported to be an assignment to this petitioner of the sole dramatic copyright of the said poems and by said instrument attempted to give to this petitioner the exclusive right to dramatize the same for production on the stage throughout the world (Rec., p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

The bill further alleges that after the assignment to this petitioner, the defendant Knowles wrote a drama entitled "Over the Hills to the Poorhouse", which tells the story as is related in the poems aforementioned with certain additions, elaborations and modifications and that the other defendants gave public exhibitions thereof without the petitioner's consent and for which alleged infringement petitioner asks for an injunction together with an accounting for profits and damages.

The respondent made a motion to dismiss the bill of complaint pursuant to equity rule No. 29 on the ground that the bill of complaint did not set forth a cause of action.

The District Court dismissed the bill and in its opinion (274 Fed. 731) held in effect among other things, that Will Carleton having died in 1912, three years prior to the expiration of the copyright term, that Norman E. Goodrich, his executor, had no right in 1915 to apply for or secure a renewal of the copyright, and followed the decision in the case of *Silverman* vs. *Sunrise Pictures Co.*, 273 Fed. 909, which held that the opening of the last year of the original copyright, the author could not bequeath the right to apply or secure the renewal or extension of the original copyright. The District Court reached the conclusion:

> "The author, Will Carleton, at his decease had no rights which he could dispose of in the old copyright which he had assigned. He had no rights which he could dispose of in the power of renewal, as the time when such rights could be conferred by renewal had not arrived. The power to renewal apparently vested in his next of kin and was not exercised and no valid copyright for the renewal period now exists."

The Circuit Court of Appeals affirmed the decree of the District Court dismissing the bill on its opinion rendered in *Silverman* vs. *Sunrise Pictures Co.*, *supra* (Rec., p. 26, fol. 60).

POINT I.

The complainant has no valid copyright.

The question, to be determined on this appeal, is, has the petitioner a valid copyright? Respondents contend it has not.

Section 24 of the Copyright Law reads:

> "That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor hereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term."

In the case at bar Carleton died in 1912, *three years prior to the expiration of the copyright* leaving a will naming Norman E. Goodrich as sole legatee and Executor. In February, 1915, three years after the death of the author, Goodrich, as sole legatee and as Executor, applied for and secured a renewal of the copyright.

Assuming that Norman E. Goodrich as legatee of the author Carleton acquired title to the copyright then existing at the time of Carleton's death, he did not acquire any right of renewal thereof for the reason stated by Judge Hough speaking for the Circuit Court of Appeals in the Silverman case, supra.

> "The author cannot take away the rights of the widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated—a new estate, not a true extension of the existing copyright.
>
> But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

And as Judge Knox said in the case of *Fox Film* vs. *Knowles*, 275 Fed. 852:

> "As it was with Mrs. Wilson, so it was with Will Carleton—he died before the open-

ing of year within which the renewal obtained by him could again be renewed."

The Court in the Silverman case further remarked in construing section 24:

> "We construe the section as vesting the right in, or imposing the duty on executors only when the power or privilege of obtaining renewal was existing in the testator-author, at the moment of his decease. This avoids the anomaly of requiring executors as such to do something in respect of a property right not passing by the will appointing them or capable of so passing. It is consequently held here, that since the renewal right did not exist, it was not affected by the will, or the appointment of executors, in short there was a necessary absence of a will in respect to this right, which only came into existence some five years after the testatrix died."

In the present case, *the right,* if it may be called such, *came into existence three years after the testator's death.* Therefore, when Goodrich obtained this renewal of the copyright in 1915, he did not obtain a valid copyright either as legatee or as Executor. That being so, he had nothing to bequeath to his wife, and she in turn had nothing to assign to this petitioner.

Counsel for petitioner argues that the construction placed upon this section by the District Court and the Circuit Court of Appeals is contrary to the legislative intent in the enacting of the said statute and has included in his brief excerpts from the committee reports of Congress.

There is no doubt that the amendment was designed to assist authors and to give them the benefit of the renewal of the copyright, for it often happens that an author for various reasons sells his copyright outright to a publisher for an insignificant sum and the work thereafter proves to be a valuable asset, sometimes beyond the term of the original copyright.

The copyright statute as it is now in force was enacted to enable an author or those who may be dependent upon him to reap the value of his work, but only under certain circumstances. Under the section as it now reads, neither the author nor his assignee possesses any right or power, which may be transferred to run beyond a period of 28 years. When the renewal of the copyright is sought, *a new property right is created*, not in any way dependent upon the previous benefits of the original copyright. *This new property right, however, does not come into being until the beginning of the last year of the original copyright.* Not until then has the author any estate or right which he can bequeth. The right of renewal which is a new property right therefore, was no part of the estate of Will Carleton at the time of his death, and therefore, the renewal right could not pass under his will as he did not possess the same at the time of his decease.

Petitioner argues that if our construction of the statute is correct, that Congress would not have inserted the word "Executor" in this section unless it was intended that the author should have the right to bequeath the renewal right in advance of its accrual. But Congress, we believe, appreciated that an occasion might arise

where the author might die *within the last year* of the copyright without having applied for a renewal and where no widow or children survived him. Under these conditions it gives the Executor the right to obtain the renewal for the benefit of the estate of the author, *as the new property right was in existence at the time of the author's death.*

Petitioner in his brief contends that its construction of the statute is in accordance with the decision in the case of *White-Smith* vs. *Goff*, 187 Fed. 247. A careful examination of the *supra* case will disclose to this court that there is no conflict between that case and the Silverman case, but rather that these two decisions are in harmony.

In the White-Smith case the action was brought by the plaintiff asserting to be the proprietor of certain copyright acquired by it from the author. Prior to the expiration of the original term of the copyright, the complainant as assignee of the author, sought to extend the copyright for a further renewal term of twenty-eight years The court in that case held that the proprietor was not entitled to the extension or renewal, as the sole right to any such extension or renewal was vested in the author, and was conditional upon his survival, such right only accruing to him within one year prior to the expiration of the original copyright term.

The court said at page 248:

> "Moreover, as is thoroughly settled by the Supreme Court, all rights of copyright in the

United States are purely statutory, whatever they may once have been in England; and it is not so easy to understand how there can be a vested right under a public statute which has not actually accrued, and which lies only in the future."

It is this proposition that was determined in the case of *Silverman* vs. *Sunrise Pictures Co., supra.* for the Court in that case held that a vested right did not accrue to the author until within one year prior to the termination of the copyright period, and that therefore, there was no estate which could be either bequeathed or devised or could it be taken by his next of kin in the event of intestacy

In the White-Smith case the Court further held that an assignment of the right of renewal made *within* one year prior to the expiration of the original term would have been valid under Section 24 of the Copyright Law. This is in harmony with the Silverman case, and with the contention made by the respondents herein, for if Will Carleton, the author, had continued to live to within one year prior to the expiration of the term of the original copyright, and had during that year either assigned or bequeathed his right to renewal, the same would have been valid. If the author had lived to within the said year, and died during the year, then his Executor would have received an Estate which would have entitled him to exercise the right to renewal.

The determination and opinion of the Courts in these two last cited cases are not inconsistent

and are in accord on the point involved in this case, both as to the legislative intent and as to the construction to be placed upon the statute.

POINT II.

It is respectfully submitted that Section 24 of the copyright Act as construed by the District Court and Circuit Court of Appeals is correct and that the decree should be affirmed with costs.

Respectfully submitted,

Louis R. Bick,
Solicitor for Respondent.

(5674)

FILED
OCT 6 1922
WM. R. STANSBU
CLERK

Supreme Court,

OF THE UNITED STATES.

FOX FILM CORPORATION,
Petitioner,

vs.

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, HARRY MEYERS and JOSEPH S. KLEIN,
Respondents.

October Term, 1922
No. 311

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DEPARTMENT.

RESPONDENTS' BRIEF.

LOUIS R. BICK,
Solicitor for Respondent.

Printed by LIBMAN'S LAW PRINTERY, 120 PARK ROW, NEW YORK

INDEX.

	PAGE
Copyright of poems by Harper & Bros. 1873	2
Renewal of Application by author in 1901	2
Death of author in 1912	2
Application by executor for renewal in 1915	3
Death of Goodrich and will beqeathing all his property to his wife, Alice L. Goodrich, who assigned her rights to petitioner	3
Allegations of infringement	3
Motion to dismiss granted and affirmed	4
Section 24 of the Copyright Act	5
Quotaton from Judge Knox's opinion in present case	6
Answer to petitioner's argument that the lower court misconstrued the act	7
Reason for the insertion of word "executor" in Act	8
Discussion of White-Smith vs. Goff case	9
Similarity of ruling in White-Smith case and Silverman case	10

TABLE OF CASES CITED:

	PAGE
Silverman vs. Sunrise Pictures corp. 273 Fed. 909	4
White-Smith Pub. Co. vs. Goff, 187 Fed. 247	9

To be argued by
LOUIS R. BICK.

Supreme Court,

OF THE UNITED STATES.

FOX FILM CORPORATION, Petitioner, vs. FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS, HARRY MEYERS and JOSEPH S. KLEIN, Respondents.	October Term, 1922 No. 311

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND DEPARTMENT.

RESPONDENTS' BRIEF.

This is an appeal pursuant to a writ of certiorari granted by this Honorable Court from an order of the Circuit Court of Appeals for the Second Circuit, affirming a final decree of the Southern District of New York, dismissing the petitioner's bill of complaint upon a motion to dismiss under Equity Rule 29 in an action for infringement of a copyright.

Statement.

The bill of complaint alleges that prior to February 1st, 1873, one Will Carleton wrote a series of poems entitled "Farm Ballads", which contained among other things two certain poems entitled "Over the Hills to the Poorhouse" and "Over the Hills from the Poorhouse" (Rec., p. 1, fol. 3).

That prior to the 21st day of February, 1873, Will Carleton assigned said series of poems entitled "Farm Ballads" including the two poems aforementioned and his literary properties therein, including all his rights therein and the right to secure copyright therefor, to Harper & Bros.

That on or about the 21st day of February, 1873, Harper & Bros. copyrighted the two poems aforementioned (Rec., p. 2, fols. 3-5).

That within one year before the expiration of the copyright obtained by Harper & Bros. and on the 7th day of January, 1901, Will Carleton filed an application with the Register of copyrights for the renewal of said copyright, and on the 7th day of January, 1901, said copyright was renewed from the 21st day of February, 1901, for a period of fourteen years to and including February 21st, 1915 (Rec., pp. 2-3, fol. 5).

That prior to the expiration of this renewal period and in 1912, *Will Carleton died leaving a will naming Norman E. Goodrich as his sole legatee and nominating him as his executor* (Rec. p. 3, fol. 6).

That within one year before the expiration of the renewal of this copyright, heretofore obtained by Will Carleton, and *three years after the death*

of Will Carleton, Norman E. Goodrich as executor and sole legatee of the Estate of Will Carleton on or about the 21st day of February, 1915, *filed an application for the renewal of said copyright of the said copyright and the said copyright was again renewed from February 21st,* 1915, *for a further period of fourteen years to and including the 21st day of February,* 1929 (Rec., p. 3, fol. 6).

That thereafter and in July, 1915, Norman E. Goodrich died leaving a will in which he made Alice L. Goodrich, his wife, his sole legatee and nominated her as his executrix.

That on the 20th day of October, 1920, Alice L. Goodrich as executrix and sole legatee of the Estate of Norman E. Goodrich, deceased, executed what purported to be an assignment to this petitioner of the sole dramatic copyright of the said poems and by said instrument attempted to give to this petitioner the exclusive right to dramatize the same for production on the stage throughout the world.

The bill further alleges that after the assignment to this petitioner, the defendant Knowles wrote a drama entitled "Over the Hills to the Poorhouse", which tells the story as is related in the poems aforementioned with certain additions, elaborations and modifications and that the other defendants gave public exhibitions thereof without the petitioner's consent and for which alleged infringement petitioner asks for an injunction together with an accounting for profits and damages (Rec., p. 4, fol. 8; pp. 4 and 5, fols. 9-11).

The respondent made a motion to dismiss the bill of complaint pursuant to equity rule No. 29 on the ground that the bill of complaint did not set forth a cause of action.

The District Court dismissed the bill and in its opinion (275 Fed. 852) held in effect among other things, that Will Carleton having died in 1912, three years prior to the expiration of the copyright term, that Norman E. Goodrich, his executor, had no right in 1915 to apply for or secure a renewal of the copyright, and followed the decision in the case of *Silverman* vs. *Sunrise Pictures Co.*, 273 Fed. 909, which held that the opening of the last year of the original copyright, the author could not bequeath the right to apply or secure the renewal or extension of the original copyright. The District Court reached the conclusion:

> *"That neither as legatee or as Executor did Norman E. Goodrich not obtain valid copyright by the action taken by him on or before February 21st, 1915. He, therefore had nothing which he could bequeath to his wife and she in turn conveyed no title to the complainant."*

The Circuit Court of Appeals affirmed the decree of the District Court dismissing the bill on its opinion rendered in *Silverman* vs. *Sunrise Pictures Co., supra* (Rec., p. 25, fol. 65).

POINT I.

The complainant has no valid copyright.

The question, to be determined on this appeal, is, has the petitioner a valid copyright? Respondents contend it has not.

Section 24 of the Copyright Law reads:

> "That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower or children of the author, if the author be not living, or if such author, widow, widower or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: Provided, however, That if the work be a composite work upon which copyright was originally secured by the proprietor hereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: Provided, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term."

In the case at bar Carleton died in 1912, *three years prior to the expiration of the copyright* leaving a will naming Norman E. Goodrich as sole legatee and Executor. In February, 1915, three years after the death of the author, Goodrich, as sole legatee and as Executor, applied for and secured a renewal of the copyright.

Assuming that Norman E. Goodrich as legatee of the author Carleton acquired title to the copyright then existing at the time of Carleton's death, he did not acquire any right of renewal thereof for the reason stated by Judge Hough speaking for the Circuit Court of Appeals in the Silverman case, supra.

> "The author cannot take away the rights of the widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such right arises it is—as above stated—a new estate, not a true extension of the existing copyright.
>
> But what may be assigned can ordinarily be devised, and it results that before the statutory year, the author cannot devise the renewal right; consequently in this case Mrs. Wilson's legatees took no such right, so far as this novel is concerned, because shortly, the testatrix had as yet nothing to leave."

And as Judge Knox said in the instant case:

> "As it was with Mrs. Wilson, so it was with Will Carleton—he died before the open-

ing of year within which the renewal obtained by him could again be renewed."

The Court in the Silverman case further remarked in construing section 24:

> "We construe the section as vesting the right in, or imposing the duty on executors only when the power or privilege of obtaining renewal was existing in the testator-author, at the moment of his decease. This avoids the anomaly of requiring executors as such to do something in respect of a property right not passing by the will appointing them or capable of so passing. It is consequently held here, that since the renewal right did not exist, it was not affected by the will, or the appointment of executors, in short there was a necessary absence of a will in respect to this right, which only came into existence some five years after the testatrix died."

In the present case, *the right,* if it may be called such, *came into existence three years after the testator's death.* Therefore, when Goodrich obtained this renewal of the copyright in 1915, he did not obtain a valid copyright either as legatee or as Executor. That being so, he had nothing to bequeath to his wife, and she in turn had nothing to assign to this petitioner.

Counsel for petitioner argues that the construction placed upon this section by the District Court and the Circuit Court of Appeals is contrary to the legislative intent in the enacting of the said statute and has included in his brief excerpts from the committee reports of Congress.

There is no doubt that the amendment was designed to assist authors and to give them the benefit of the renewal of the copyright, for it often happens that an author for various reasons sells his copyright outright to a publisher for an insignificant sum and the work thereafter proves to be a valuable asset, sometimes beyond the term of the original copyright.

The copyright statute as it is now in force was enacted to enable an author or those who may be dependent upon him to reap the value of his work, but only under certain circumstances. Under the section as it now reads, neither the author nor his assignee possesses any right or power, which may be transferred to run beyond a period of 28 years. When the renewal of the copyright is sought, *a new property right is created,* not in any way dependent upon the previous benefits of the original copyright. *This new property right, however, does not come into being until the beginning of the last year of the original copyright.* Not until then has the author any estate or right which he can bequeth. The right of renewal which is a new property right therefore, was no part of the estate of Will Carleton at the time of his death, and therefore, the renewal right could not pass under his will as he did not possess the same at the time of his decease.

Petitioner argues that if our construction of the statute is correct, that Congress would not have inserted the word "Executor" in this section unless it was intended that the author should have the right to bequeath the renewal right in advance of its accrual. But Congress, we believe, appreciated that an occasion might arise

where the author might die *within the last year* of the copyright without having applied for a renewal and where no widow or children survived him. Under these conditions it gives the Executor the right to obtain the renewal for the benefit of the estate of the author, *as the new property right was in existence at the time of the author's death.*

Petitioner in his brief contends that its construction of the statute is in accordance with the decision in the case of *White-Smith* vs. *Goff*, 187 Fed. 247. A careful examination of the *supra* case will disclose to this court that there is no conflict between that case and the Silverman case, but rather that these two decisions are in harmony.

In the White-Smith case the action was brought by the plaintiff asserting to be the proprietor of certain copyright acquired by it from the author. Prior to the expiration of the original term of the copyright, the complainant as assignee of the author, sought to extend the copyright for a further renewal term of twenty-eight years. The court in that case held that the proprietor was not entitled to the extension or renewal, as the sole right to any such extension or renewal was vested in the author, and was conditional upon his survival, such right only accruing to him within one year prior to the expiration of the original copyright term.

The court said at page 248:

> "Moreover, as is thoroughly settled by the Supreme Court, all rights of copyright in the

> United States are purely statutory, whatever they may once have been in England; and it is not so easy to understand how there can be a vested right under a public statute which has not actually accrued, and which lies only in the future."

It is this proposition that was determined in the case of *Silverman* vs. *Sunrise Pictures Co., supra.* for the Court in that case held that a vested right did not accrue to the author until within one year prior to the termination of the copyright period, and that therefore, there was no estate which could be either bequeathed or devised or could it be taken by his next of kin in the event of intestacy

In the White-Smith case the Court further held that an assignment of the right of renewal made *within* one year prior to the expiration of the original term would have been valid under Section 24 of the Copyright Law. This is in harmony with the Silverman case, and with the contention made by the respondents herein, for if Will Carleton, the author, had continued to live to within one year prior to the expiration of the term of the original copyright, and had during that year either assigned or bequeathed his right to renewal, the same would have been valid. If the author had lived to within the said year, and died during the year, then his Executor would have received an Estate which would have entitled him to exercise the right to renewal.

The determination and opinion of the Courts in these two last cited cases are not inconsistent

and are in accord on the point involved in this case, both as to the legislative intent and as to the construction to be placed upon the statute.

POINT II.

It is respectfully submitted that Section 24 of the copyright Act as construed by the District Court and Circuit Court of Appeals is correct and that the decree should be affirmed with costs.

Respectfully submitted,

Louis R. Bick,
Solicitor for Respondent.

FILED
NOV 20 1
WM. R. STAN
C

Supreme Court of the United States.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,
Petitioner,

—against—

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, &c., HARRY MEYERS, and JOSEPH S. KLEIN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF AMICUS CURIAE.

J. JOSEPH LILLY,
Attorney for Sunrise Pictures Corporation,
Amicus Curiae.

THE COURT PRESS—27 West Street—Bowling Green 3620

Supreme Court of the United States.

OCTOBER TERM, 1922—No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF SUNRISE PICTURES CORPORATION AS AMICUS CURIAE.

Statement.

Sunrise Pictures Corporation, being gravely interested in the decision to be made by this Court in the above entitled cause, inasmuch as such determination will control the decision of similar questions by the United States Circuit Court of Appeals for the Second Circuit in the case of *Silverman* v. *Sunrise Pictures Corporation*, to which Circuit Court of Appeals the said Sunrise Pictures Corporation has duly appealed from a final decree perpetually enjoining it from exhibiting or otherwise dealing with a certain motion picture, as *amicus curiae*, respectfully asks consideration of the following points.

BRIEF OF THE ARGUMENT.

POINT I.

The renewal of a copyright is truly an extension of an existing right.

At page 913 of its opinion in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, the Circuit Court of Appeals held to the contrary. Such, however, is the plain intendment of Sections 23 and 24 of the Copyright Law of 1909 and Section 4954 of the Revised Statutes; which, in the Act of 1909, provided for the renewal and extension of existing copyrights, and in the Revised Statutes, for the continuance of the same exclusive rights of copyright.

The Constitution (Art. 1, Sec. 8, Cl. 8) provides for but one "exclusive right to their respective writings" which may be secured "for limited times to authors."

The right so provided for and allowed to be created is singular, the times of its security as Congress deems best, may be plural.

Having adequate jurisdiction in the matter Congress may, as it has, permit an author to assign so much of his "right" as is bounded in point of time by the original period of copyright protection; and having thus, by inducing the public disclosure of what had previously been private literary property, accomplished the primary object of all copyright legislation, "the progress of science and the useful arts," it may with a view to the further accomplishment of the

same high purpose prevent the author from selling or giving away the future periods of an once-obtained copyright until such future period has actually begun, prevent the disinheritance of the author's widow, widower or children until after the commencement of such renewed or extended period and enable the author, if unmarried and childless, to dispose by will, to whomsoever he pleases, of the authorized renewed or extended period of copyright which he might not live to enjoy, or suffer it to go into the possession of such relatives as the law of his domicile selected for the possession of so much of his property as to which he will have died intestate.

Section 24 of the Copyright Law of 1909, quoted at length on page 5 of the respondent's brief, does not disturb the ordinary rules of title and succession to property to the extent decided by the Circuit Court of Appeals in the *Silverman* case. Neither does it create any

> "new right or estate not growing legally out of the original copyright property."
>
> *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909 at p. 911.

If Section 24 actually created in widows, children, executors and next of kin

> "a new estate, not a true extension of the existing copyright" (id., p. 913).

or a

> "new right or estate not growing legally out of the original copyright property" (id., p. 911).

it would be ineffective and void, at least insofar as it gave such "new right or estate" to any other person than the author of a copyrighted work, as violative of the Constitution.

Interpreting the copyright clause of the Constitution (Art. 1, Sec. 8, Cl. 8) in its natural sense (*Gibbons* v. *Ogden*, 9 Wheat, 1 at p. 187, *et seq.*), and remembering that Congress has only those legislative powers which have been accorded to it (*Missouri* v. *Holland*, 252 U. S. 416 at p. 433; *Kansas* v. *Colorado*, 206 U. S. at p. 84; *Houston* v. *Moore*, 5 Wheat, 1 at p. 48) and that the theory of our Government is opposed to the deposit of unlimited power anywhere (*Curry* v. *District of Columbia*, 14 App. D. C. 423 at p. 439; *Board of Education* v. *Minor*, 23 Ohio St. 211, at p. 233), it is utterly impossible to agree with the opinion of the Circuit Court of Appeals in the *Silverman* case.

> "The right of any other person than the author * * * must * * * be a purely secondary and derivative one and in enforcing any alleged copyright such a person must show an exclusive right lawfully derived from the author * * *."
>
> *Yuengling* v. *Schile*, 12 Fed. 97, at p. 100.

How then could the renewal term of copyright, as and when its period commenced, in the case at bar, or in any other case where the author-testator died before the commencement of the statutory year, and the prescribed application was made by his executor, be anything else than an extension of the prior copyright, exclusively residing in the executor of the deceased

author, the only lawful applicant therefor, and legally derived by him from his testator-author?

That other persons, the legatees, might have the right to compel the executor to assign the renewed or extended term to them does not and would not enable them to file the application for renewal which under the statute only the executor could make.

> "The sole object and purpose of the laws which constitute the patent and copyright system is to give the author and inventor a monopoly of what he has written or discovered that no one else shall make or use or sell his rights or his invention without his permission and what is granted to him is the exclusive right, not the abstract right, but the right in him to the exclusion of everybody else."
>
> *In re Bresnahan*, 18 Fed. 62, at p. 64.

To interpret Section 24 as creating a new property right not growing legally out of the original copyright property places Congress in the position of having violated its constitutional powers. To interpret that section according to the natural and unconstrained meaning of its language avoids the necessity of charging Congress with having exceeded its authority, leaves to unmarried and childless authors the unlimited right of bequeathing their prospective renewal terms and accomplishes the result which Congress intended. As between the two constructions there can be no choice save that which favors the constitutionality of the section.

POINT II.

The language of Section 24 of the Copyright Law excludes the idea of any other copyright than the one obtained upon first publication.

The act (Section 24), quoted at length on page 5 of the Respondents' brief, provides for the renewal and extension of a subsisting copyright for such further period "that the entire term shall be equal to that provided for by this act, including the renewal period."

The construction thereof by the Circuit Court of Appeals in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909 at page 913:

> "vesting the right in, or imposing the duty on executors, only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of death"

is clearly at variance with the language of the act, which contemplated one copyright, divided into as many periods as were necessary to permit of there being one

> "entire term * * * equal to that secured by this act, including the renewal period" (§24).

By the language of the act, authors in whose works there were subsisting copyrights were vested with the privilege of extending or renew-

ing their copyrights from the time when the act took effect upon the sole proviso of compliance with the statutory conditions, but they were not vested with any new copyright.

The mere fact that the administrative function of applying for the renewal or extension could not be performed until during the last year of the existing term, did not change the fact of the existence of any copyright or alter the author's privilege of applying for the renewal or extension thereof, but merely delayed the date upon which the will to exercise such privilege could be effectively demonstrated.

Congress could not well have omitted to prescribe the time when application for renewal and extension for which it provided should be made, because without such application having been made prior to "the expiration of the term provided for under existing law" the work would pass into the public domain (R. S. 4953, Copyright Law of 1909, §23).

It would have made no substantive difference in the law if the time for the making of the application had been fixed at one day, or one month, before the expiration of the existing term, or within one year after the taking effect of the Act.

The rights of an author in all matters concerning copyright originate at the publication of his work. The rights of all other takers, recognized by the statute as inheritors of all uninitiated additional periods of copyright protection, originate with the death of the author.

Persons become widows, widowers, executors and next of kin at the time of another's death, and so far as any question of property is con-

cerned their rights as such widows, widowers, executors and next of kin accrue at the time of the death of the person under whom they claim,

> *Cordova* v. *Folgueres Y Rijos*, 227 U. S. 373 at p. 377;
> *Randall* v. *Krieger*, 23 Wall. 137;
> *Seaboard A. L. Co.* v. *Kenney*, 240 U. S. 489;
> *Hutchinson Investment Co.* v. *Caldwell*, 152 U. S. 39;
> *Tillman* v. *Davis*, 95 N. Y. 17;
> *Perryman* v. *Green*, 39 Ala. 133;
> *12 Corpus Juris*, 963,

and not at any other time.

POINT III.

The Circuit Court of Appeals erred in holding, in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, that the executors of a deceased author could not make application for the renewal period unless the privilege of obtaining the renewal was existing in the author at the moment of decease.

The precise interpretation in the *Silverman* case, followed by the Court whose ruling is now under review, is here repeated (p. 913):

> "Result is that we construe the section as vesting the right in, or imposing the duty on executors, only when the power or privilege of obtaining renewal was existing in the testator-author at the moment of decease."

We have no less difficulty than the petitioner in following the above quoted reasoning of the Circuit Court of Appeals, and beg to submit that the interpretation given to the Statute by that Court is erroneous in that it,

1. divorces authorship from the right to obtain a renewal,

2. interprets into the Statute a provision which its plain language does not warrant.

3. introduces into the copyright system a class of persons who are neither authors nor claimants under authors,

4. defeats the fair, reasonable and just intention of Congress to permit unmarried and childless authors to bequeath their future periods of copyright to persons of their own selection,

5. awards to mere kindred property rights which Congress did not intend that they should have,

6. awards to mere kindred property rights which authors, contemplating death, have willed that others should have.

Congress did not as the Circuit Court of Appeals interpreted the Act by the language quoted at pages 12 and 13 of Petitioner's brief take away anything from authors.

Unless the language of Section 24 of the Copyright Law of 1909 is wholly deceptive, it gave to authors something which they did not have before, viz. a more extended renewal term than that which was authorized by R. S. 4954 and the additional privilege, except where there was a widow, widower or children, of disposing by

will of the right to enlarge the limited time for the duration of the copyrights originally obtained or permit such privilege of enlargement to pass upon their deaths to their relatives by blood.

The reasoning of the Circuit Court of Appeals hereinabove quoted fails wholly when we consider that, as practical men, Congress could not have thought of giving an author the right to bequeath the privilege of applying for the renewal period of a copyright only during the year in which the author himself could file application for it, because, once that year commenced, the reasonable probability would be that the author, himself, would file the necessary application and not leave such important business to be accomplished after his death, the time of which is altogether uncertain and regulated by Higher Authority than any Congressional enactment.

POINT IV.

The Circuit Court of Appeals confused the renewal term and the application to be made therefor.

This was demonstrated by so much of the opinion in the *Silverman* case (273 Fed. 909) as said at pages 912-913:

> "the author cannot take away rights of widow, children, etc., before the opening of the last year of original copyright. It is not until then that any estate or chose in action arises or exists; and when such

> right arises it is—as above stated—a new estate not a true extension of the existing copyright."

The clear language of the Act is that the renewed or extended term may be obtained "at the expiration of the term provided for under existing law" by the author "if still living."

It consequently follows that if the author is dead at the time of the expiration of the term to be "renewed and extended", such "further period" was not actually obtained by him and was therefore neither assignable nor vendible by him, even though he may, within one year prior to the expiration of the term then existing, have filed and registered his application "for such renewal and extension."

Upon an author's death at any time within the so-called statutory year, no less than before the commencement of that year, the prospective renewal term is the property in expectancy of the deceased author's widow or widower, which, under the statute he or she takes, provided, he or she makes the necessary application, as free from the claims of creditors as do the next of kin in the instances where they may inherit.

So also in respect to the inheritance of the renewal term by children.

What Congress deferred by the language of §24 was the time of enjoyment and assignability of the extended term of copyright. It did not deprive the expectant estate of its character as property, but merely withheld from it some, but not all, of the incidents of wholly vested property.

The question is not of a Congressional restraint upon the alienation of the renewal term, as the

Circuit Court of Appeals seemed to think, but of the nature of the estate which Congress raised.

It was within the authority of Congress to withhold renewal terms of copyright in the works of deceased authors entirely from the claims of creditors. It did not add this exemption to a renewal term where no widow, widower or children took and the deceased author had appointed executors of his estate, but this merely serves to emphasize the fact that a renewal term as and when it actually commences, which cannot be at any time before the "expiration of the term provided for under existing law" is part of the estate of the deceased author and truly, just what Congress said it was, a "renewal and extension" of "the copyright subsisting in any work" and not as the Circuit Court of Appeals held "a new estate," or "a property right not passing" (to the executors of a deceased author) "by the will appointing them or capable of so passing."

POINT V.

The interpretation placed by the United States Circuit Court of Appeals for the Second Circuit on Section 24 of the Copyright Act of 1909 in the case of Silverman v. Sunrise Pictures Corporation, 273 Fed. 909, upon the authority of which the above entitled cause was decided by said Court, was wholly erroneous.

Respectfully submitted,

J. JOSEPH LILLY,
Attorney for Sunrise Pictures Corporation,
Amicus Curiae.

Office Supreme Court,
FILED
MAY 27 1922
WM. R. STANSB
OLE

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 826 311

FOX FILM CORPORATION,

Appellant,

against

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS (the first name "William" being fictitious, the real name of this defendant being unknown to plaintiff), HARRY MEYERS and JOSEPH S. KLEIN,

Appellees.

NOTICE OF MOTION AND PETITION TO ADVANCE.

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

Motion to Advance.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

FOX FILM CORPORATION, Appellant, against FREDERICK M. KNOWLES, "WILLIAM" O. MCWATTERS (the first name "William" being fictitious, the real name of this defendant being unknown to plaintiff), HARRY MEYERS and JOSEPH S. KLEIN, Appellees.	#826.

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of SAUL E. ROGERS, verified May 26, 1922, the undersigned will move this court, at a stated term thereof, to be held at the Supreme Court of the United States, Washington, D. C., on the 29th day of May, 1922, at the opening of court on that day, or as soon thereafter as counsel can be heard, for leave to advance the above entitled appeal, on the ground that it involves or affects a matter of general public interest, or in the alternative that the said appeal herein be transferred to the Summary Docket for the first Monday of October, 1922, by reason of the fact that the argument of the appeal herein and the argument of the appeal

in the case of Fox Film Corporation, Appellants vs. Frederick M. Knowles, et al., Appellees, #825, involving the same questions, will not take over one-half hour for the appellant and the same time for the appellees, and for such other and further relief as may be proper in the premises.

Dated, New York, May 26th, 1922.

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

To:
BICK, GODNICK & FREEDMAN, Esqs.,
Attorneys for Appellees,
215 Montague Street,
Borough of Brooklyn,
New York City.

Petition to Advance the Above Entitled Appeal.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

FOX FILM CORPORATION,
Appellant,

against

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS (the first name "William" being fictitious, the real name of this defendant being unknown to plaintiff), HARRY MEYERS and JOSEPH S. KLEIN,
Appellees.

#826.

TO THE SUPREME COURT OF THE UNITED STATES:

The petition of SAUL E. ROGERS, attorney for the appellant, respectfully shows and alleges:

FIRST: That this is an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the District Court of the Eastern District of New York, dismissing the appellant's complaint in an action for infringement by the appellant against the appellees, in which it was determined that the appellant had no valid dramatic copyright of two poems written by Will Carleton entitled "Over the Hill to the Poorhouse" and "Over the Hill from

10 the Poorhouse," contained in a collection called "Farm Ballads." Upon the authority of *Silverman* vs. *Sunrise Pictures Corporation*, also decided in the Second Circuit (273 Federal Reporter, 909), it was determined that Section 24 of the Copyright Act was construed to be that in the absence of the widow or children the executor had no right to obtain a renewal of the prior copyright, unless the power or privilege of obtaining the renewal was existing in the testator-author at the moment of decease.

SECOND: On an application made by the appel-
11 lant for a Writ of Certiorari to this Honorable Court, said writ was duly granted on April 17, 1922, and the return to said writ has been duly filed with the Clerk of this Court on or about May 10, 1922.

REASONS FOR THE ALLOWANCE OF THE MOTION TO ADVANCE.

1. The question is one of great importance to the motion picture industry which is now using dramatic compositions in which the copyright protection is similar to that in this case. By reason of the uncertainty of the law with respect to
12 the renewal of copyrights, producers hesitate to invest large sums of money necessary to produce pictures that may involve the validity as to copyright, when there is such uncertainty as to copyright protection.

2. The question is also of great importance because your petitioner is advised that recently several cases have arisen in the District Courts and

the Circuit Court of Appeals involving the same question, and that these cases are being held up pending the determination of this Court in the instant case. 13

3. The question is of great importance also to authors and dramatists, or their widows and children, or executors, legatees, or next-of-kin, in the numerous cases where the author has not lived to within one year of the expiration of his copyright.

Your petitioner is informed that registration for renewal of copyrights are frequent, and until the law with respect to the renewal of copyrights is settled by this Court, persons who have been heretofore considered by Congress to be the natural recipients and objects of the author's bounty with reference to obtaining the benefits of renewal copyrights, are unable to dispose of such rights until the law with respect to renewal copyrights is settled by this honorable Court. 14

For the above reasons it is respectfully submitted that leave should be granted to advance the above appeal, because it involves or affects some matter of general public interest.

REASONS FOR TRANSFERRING APPEAL TO SUMMARY DOCKET FOR THE FIRST MONDAY OF OCTOBER, 1922. 15

Your petitioner further respectfully submits that in the alternative that leave be granted to transfer the above entitled appeal to the Summary Docket for the first Monday of October, 1922, for the reason that your petitioner, who intends to argue the appeal alone on behalf of the

16 appellant and the appeal in another case, entitled *Fox Film Corporation, Appellant*, vs. *Frederick M. Knowles, et al., Appellees*, #825, involving the same question, will not take up more than one-half an hour in his argument in both cases before this Court, and your petitioner is also advised that counsel for the appellees have stated that they do not expect to take any longer time than one-half an hour in their argument in both cases on behalf of the appellees before this Court.

For the above reasons it is submtited that leave should be granted to advance this appeal to the Summary Docket for the first Monday of October,
17 1922.

WHEREFORE, your petitioner prays that the motion for leave to advance herein be granted, because the appeal involves a matter of general public interest, or in the alternative that the appeal be transferred to the Summary Docket for the first Monday of October, 1922, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

SAUL E. ROGERS,
Petitioner.

18

SAUL E. ROGERS,
Attorney for Appellant,
Office & P. O. Address,
850 Tenth Avenue,
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.: 19

SAUL E. ROGERS, being duly sworn, deposes and says:

That he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

SAUL E. ROGERS.

Sworn to before me this 26th day of May, 1922. } 20

George Bleich

Notary Public, New York County No. 548
Kings County Register No. 3358;

21

Office Supreme Court, U. S.
FILED
NOV 4 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,
Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEFS AS AMICUS CURIAE.

J. JOSEPH LILLY,
Attorney for
Sunrise Pictures Corporation,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,

Respondents.

Now comes Sunrise Pictures Corporation and moves that upon the annexed petition, the briefs filed on behalf of the parties, and the transcript of the record in the above entitled cause sent to this Court in obedience to its writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, its attorney be granted leave to file briefs in this cause as Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,

Respondents.

Sirs:

YOU WILL PLEASE TAKE NOTICE that the foregoing motion will be presented to the Supreme Court of the United States at a session thereof, appointed to be held at the Capitol in the City of Washington, D. C., on Monday, the 13th day of November, 1922, at the opening of Court on that day or as soon thereafter as counsel can be heard.

Dated, New York, November 2nd, 1922.

Yours, etc.,

J. JOSEPH LILLY,
Attorney for
Sunrise Pictures Corporation,
Amicus Curiae,
Office & P. O. Address,
50 Pine Street,
Borough of Manhattan,
New York City, N. Y.

To:

SAUL E. ROGERS, Esq.,
Attorney for Petitioner,
Fox Film Corporation,
West 55th Street,
Borough of Manhattan,
New York City, N. Y.

LOUIS R. BICK, Esq.,
Attorney for Respondents,
215 Montague Street,
Borough of Brooklyn,
New York City, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1922.

No. 311.

FOX FILM CORPORATION,
Petitioner,

—against—

FREDERICK M. KNOWLES, JOSEPH KLEIN, JOSEPH MORRIS, LOUIS BARET, CORSE PAYTON, CORSE PAYTON STOCK COMPANY and JOHN KAISER,
Respondents.

On Motion to File Briefs as Amicus Curiae.

Sunrise Pictures Corporation, a corporation of the State of New York, having its principal office and place of business in the Borough of Manhat-

tan, City and State of New York, prays that its attorney be granted leave to file briefs in the above entitled cause, as Amicus Curiae, for the following reasons:

1. The said Sunrise Pictures Corporation is and was the defendant in a certain suit in equity instituted in the United States District Court for the Southern District of New York by Isaac Silverman as complainant on or about January 10th, 1921.

2. In said suit the complainant applied for an injunction restraining your petitioner during the pendency thereof from selling, disposing of or publicly presenting a certain motion picture play entitled "The Price of Silence" upon the ground that such play violated the rights of copyright in a novel entitled "At the Mercy of Tiberius," which the said complainant claimed to own.

3. On February 17, 1921, the said District Court (Hon. Augustus N. Hand, D. J.) by its duly entered order denied said complainant's application and handed down an opinion (reported New York Law Journal, March 1, 1921, p. 1841) which concluded with the following language:

> "I am of the opinion that an act of Congress which lays down a clear method of procedure as to renewal of copyrights where the author left no husband, or wife, or children, and left a will, cannot be interpreted so loosely that the statutory word 'executors' is satisfied, if the owner of a partial equitable interest in the testamentary estate applies for a renewal."

4. On or about February 21, 1921, the said complainant Isaac Silverman, as permitted by Section 125 of the Judicial Code of the United States, appealed from the said interlocutory order to the United States Circuit Court of Appeals for the Second Circuit, which on May 11, 1921, reversed the aforementioned order of the District Court and handed down an opinion in writing which is reported in full at 273 Fed. R. 909.

5. Subsequently to the handing down of the aforementioned opinion the above entitled cause, on appeal from a final judgment and decree, came on to be heard before the said Circuit Court of Appeals and was decided (279 Fed. R. 1018) adversely to the above named petitioner solely upon the authority of the aforementioned opinion in *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. R. 909.

6. Thereafter and on or about May 1, 1922, this Court granted its writ of certiorari (66 L. Ed. 483) to review the said determination of the Circuit Court of Appeals for the Second Circuit made in the above entitled cause.

7. On October 18, 1921, the suit of the said Isaac Silverman against Sunrise Pictures Corporation duly came on to be tried and was tried in the United States District Court for the Southern District of New York, which Court (Hon. Augustus N. Hand, D. J.) gave judgment and final decree against your petitioner on November 1, 1921, being controlled in so doing by the aforesaid opinion of the Circuit Court of Appeals in said cause, reported 273 Fed. R. 909.

8. Sunrise Pictures Corporation duly appealed from said final decree and judgment to the United States Circuit Court of Appeals for the Second Circuit, and its said appeal is No. 11 on the calendar of said Circuit Court of Appeals for the October, 1922, term thereof, and because of the pendency of the above entitled cause before the Supreme Court of the United States and the controlling effect which the decision of the Supreme Court therein will have upon the interpretation to be given by all Courts of inferior jurisdiction, to Section 24 of the Copyright Law of 1909, the argument thereof has been adjourned.

9. The questions to be argued and decided in this Court in the above entitled cause are closely similar, in facts almost identical, so far as the interpretation of Section 24 of the Copyright Law of 1909 is concerned, to those which will be presented to and decided by the Circuit Court of Appeals for the Second Circuit upon the aforementioned appeal thereto of the Sunrise Pictures Corporation now pending undetermined before said Court.

10. The attorney for the said Sunrise Pictures Corporation has filed with the Clerk of this Court and served upon counsel for the parties of record to the above entitled cause the required number of copies of the briefs, which it asks leave to file herein, and has endeavored to obtain the consent of such counsel to the filing of its said briefs.

11. Counsel for the respondents has stated that he would consent to the filing of the aforemen-

tioned briefs on behalf of Sunrise Pictures Corporation as Amicus Curiae and would sign whatever consent or stipulation might be necessary.

12. Counsel for the petitioner has not formally objected to the filing of said briefs but has withheld his consent thereto.

13. It is believed that the proposed briefs, so filed as aforesaid, on behalf of the Sunrise Pictures Corporation will be of material assistance to this Court in arriving at a determination of the questions which it discusses, all of which are involved in the above entitled cause and in the aforementioned suit of Isaac Silverman against it, hereinbefore mentioned.

WHEREFORE Sunrise Pictures Corporation submits that it would be meet and proper to grant leave to file the aforementioned brief herein prepared by its counsel as Amicus Curiae and so prays the Court.

All of which is respectfully submitted,

J. JOSEPH LILLY,
Attorney for
Sunrise Pictures Corporation,
Amicus Curiae.

State and County of New York,
Southern District of New York—ss.:

J. JOSEPH LILLY, being duly sworn, says that he is the attorney herein for Sunrise Pictures Corporation, a corporation of the State of New York, on whose behalf the foregoing petition is submitted.

That he has read the said petition and knows the contents thereof and that the same is true of his own knowledge.

J. JOSEPH LILLY.

Subscribed and sworn to before me this
2nd day of November, 1922.

RAYMOND E. MABEN,
Notary Public,
Kings County.
Certificate filed in New York County.

Supreme Court
FILED
FEB 6 192
STANSB
CL

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922—No. 311.

FOX FILM CORPORATION,

Petitioner,

—against—

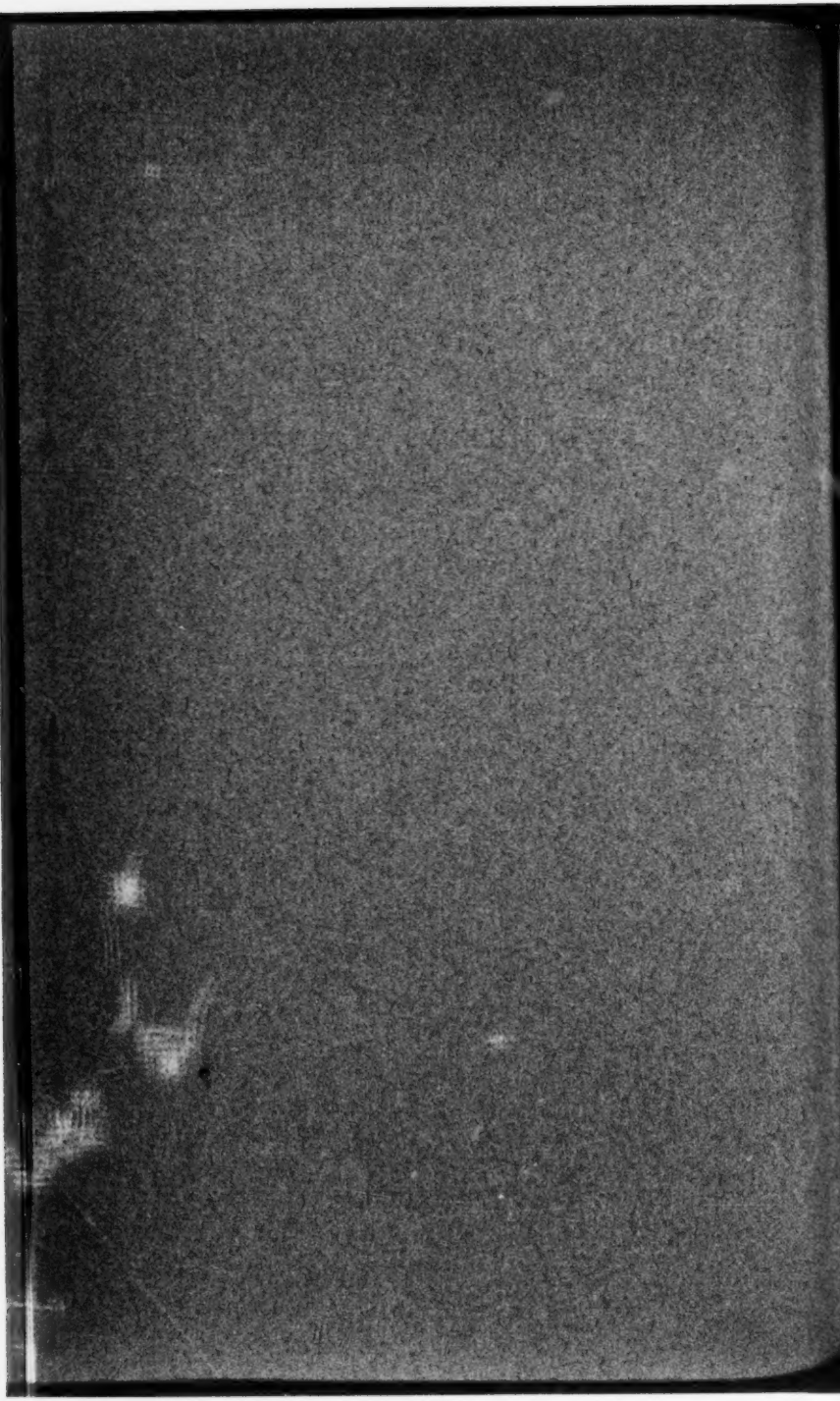
FREDERICK M. KNOWLES, "WILLIAM" C. MCWATTERS, etc., HARRY MEYERS, and JOSEPH S. KLEIN,

Respondents.

REPLY TO BRIEF OF AMICUS CURIAE.

LOUIS B. BICK,
Attorney for Respondent,
215 Montague Street,
Borough of Brooklyn,
City of New York.

Gilbert Press, N. Y. C.



INDEX.

PAGE

Statement 1

Brief of argument 2

Creation of new estate 2

Silverman & Sunrise discussed 2

Author 3

CASES CITED:

Silverman v. *Sunrise Picture Corp.*, 273 Fed. 909 1

IN THE

Supreme Court of the United States.

FOX FILM CORPORATION,

Petitioner,

—against—

FREDERICK M. KNOWLES, "WILLIAM" O. McWATTERS, etc., HARRY MEYERS, and JOSEPH S. KLEIN,

Respondents.

REPLY TO BRIEF OF AMICUS CURIAE.

Statement.

The Sunrise Picture Corporation, claiming to be gravely interested in any decision which this Court may render in this matter, asks consideration by this Court of certain points which it desires to raise in connection with the legal propositions to be determined herein.

It should be borne in mind by this Court that the Sunrise Picture Corporation is the defeated litigant in the case of *Silverman* against the *Sunrise Picture Corporation*, 273 Fed. 909, which decision governed the action of the Circuit Court of Appeals in determining the questions now being reviewed by this Court.

Brief of Argument.

POINT I.

The renewal of a copyright, as provided by Section 24 of the Copyright Law of 1909, creates a new estate.

A great portion of the argument made by *amicus curiae* in its brief, is answered by the brief in chief of the respondent and we feel that it would be but a repetition to again detail our argument on this point. We will therefore, confine ourselves merely to such reply as we feel the brief of *amicus curiae* requires.

A reading of the decision of the Circuit Court of Appeals in the *Silverman* case (*supra*) should convince this Court of the soundness of the reasoning therein contained. To sum up that decision, is in effect to say that the author can acquire no estate or rights in a copyright until the period has arrived which has been designated by Congress as conferring upon him some rights in the premises. We must bear in mind that whatever rights an author may have, or, in fact, even his assignees may have in a copyright, are all statutory. He obtains no greater rights than those which Congress from time to time has given to him.

As to the renewal provided for in Section 24 of the Copyright Law, we find that the right of renewal is not dependent upon the ownership of the original copyright, but is dependent entirely

upon the author of the copyrighted matter himself. As has been the practice for a great many years, an author would, either before copyrighting or after copyrighting, assign all his rights therein to a publishing concern for a very small consideration. The renewal statute was passed not to protect the owner of the copyright, but was merely to permit an author after the time of expiration of the original copyright, to reap the benefits of his own labor, and obtain a renewal for his own benefit. We find that while he may have alienated whatever original rights he may have had to the copyright, still Congress has reinvested him, under certain regulations, with a new estate which would become his upon the happening of a certain event, to-wit: the application for a renewal by him within one year prior to the expiration of the original term of the copyright.

To paraphrase the situation, we may liken the situation of the author of a copyrighted work to the owner of the equity of redemption in mortgaged property. There is reserved to the author, the right to redeem after a certain time and under certain conditions. This right may or may not be exercised by him. His failure to exercise that right, loses for him his equity.

While insisting in certain paragraphs of its brief that the Circuit Court of Appeals erred in holding that Congress created a new estate in favor of the author, *amicus curiae* concedes at page 9 of its brief that Congress "gave to authors something which they did not have before, viz.:— a more extended renewal term than that which was authorized by R. S. 4954."

It is with the latter conclusion that we agree, and upon which theory, no doubt, the question

was determined by the Circuit Court of Appeals.

Under and by the terms of Section 24 of the Copyright Law, the time at which the author obtains this "something" which Congress gave, does not arrive until one year preceding the expiration of the existing term. Therefore, the author not being alive at the time of the vesting of this new right or privilege, no one can claim any benefits thereunder.

Respectfully submitted,

LOUIS R. BICK,
Attorney for Respondent,
215 Montague Street,
Borough of Brooklyn,
City of New York.

FOX FILM CORPORATION *v.* KNOWLES ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 310, 311. Argued February 27, 1923.—Decided March 12, 1923.

1. Under § 24 of the Copyright Act of 1909, which allows renewals of copyrights subsisting when it went into effect with the proviso that application shall be made and registered within the period of one year prior to expiration of the existing term, an author's executor may renew, within that year, although the author died before its commencement, so that the right to file application did not accrue in his lifetime. P. 328.
2. The statute intends that an executor, there being no widow, widower or child, shall have the same right as his testator might have exercised had he continued to survive. P. 329.
3. It is no novelty for an executor to be given rights by statute which his testator could not have exercised while he lived. P. 330.

279 Fed. 1018, reversed.

CERTIORARI to decrees of the Circuit Court of Appeals affirming the District Court in dismissing bills brought by the petitioner, as assignee of copyright privileges, to restrain infringements and for accounting and damages.

Mr. Alfred A. Wheat, with whom *Mr. Saul E. Rogers* and *Mr. Wm. J. Hughes* were on the brief, for petitioner.

Mr. Louis R. Bick, with whom *Mr. Fred Francis Weiss* was on the brief, for respondents.

The copyright statute was enacted to enable an author, or those who may be dependent upon him, to reap the value of his work, but only under certain circumstances. Under the section as it now reads, neither the author nor his assignee possesses any right or power that may be transferred to run beyond a period of 28 years. When the renewal of the copyright is sought, a new property right is created, not in any way dependent upon the previous benefits of the original copyright. This new property right, however, does not come into being until the beginning of the last year of the original copyright. Not until then has the author any estate or right.

Petitioner argues that, if our construction of the statute is correct, Congress would not have inserted the word "executor" in this section, unless it was intended that the author should have the right to bequeath the renewal right in advance of its accrual. But Congress, we believe, appreciated that an occasion might arise where the author might die within the last year of the copyright without having applied for a renewal, and where no widow or children survived him. Under these conditions it gives the executor the right to obtain the renewal for the benefit of the estate of the author, as the new property right was in existence at the time of the author's death. *White-Smith Music Pub. Co.* v. *Goff,* 187 Fed. 247; *Silverman* v. *Sunrise Pictures Corporation,* 273 Fed. 909.

Mr. J. Joseph Lilly, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the Court.

These are bills in equity brought by the petitioner to restrain dramatic performances based upon two poems, "Over the Hills to the Poor House" and "Over the Hills from the Poor House," and for an account and damages. The author of the poems, Will Carleton, held a renewed copyright for them which expired on or about February 21, 1915. He died on December 18, 1912, testate, leaving all his property to Norman E. Goodrich and appointing him sole executor. On January 21, 1915, the executor applied for and obtained a renewal of the copyright to February 21, 1929. Later the exclusive right to dramatize the poems was assigned to the plaintiff. The only defense relied upon here is that the statutes did not give the executor a right of renewal and that therefore the copyright has expired. The bills were dismissed upon this ground by the District Court, (No. 310) 274 Fed. 731; (No. 311) 275 Fed. 582, and the decrees were affirmed on the authority of *Silverman* v. *Sunrise Pictures Corporation*, 273 Fed. 909, by the Circuit Court of Appeals. 279 Fed. 1018.

This copyright was subsisting when the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075, went into effect. By § 24 of that statute copyrights so subsisting "may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the

renewal period: . . . *Provided*, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term." The argument on which the statute was held not to apply to the present case was that the renewal creates a new estate, *White-Smith Music Pub. Co.* v. *Goff*, 187 Fed. 247; that the estate is purely statutory, and does not exist until within one year prior to the expiring of the existing term; that therefore Carleton dying more than a year before that moment had nothing to bequeath; and that the statute gave nothing to the executor except when the testator had the right to renew at the moment of his decease. It is argued that the executor is mentioned only to provide for the case of the testator's dying within the year without having exercised his right to renew, and thus having a right that the statute allowed him to transmit.

All of these propositions may be admitted, (for the purposes of the present argument only,) except the last. But we see no sufficient reason for thus limiting the right of the executor. The section read as a whole would express to the ordinary reader a general intent to secure the continuance of the copyright after the author's death and none the less so if the actual continuance was effected by creating a new estate, or if the beneficiaries in certain cases are pointed out. No one doubts that if Carleton had died leaving a widow she could have applied as the executor did, and executors are mentioned alongside of the widow with no suggestion in the statute that when executors are the proper persons, if anyone, to make the claim, they cannot make it whenever a widow might have made it. The next of kin come after the executors. Surely they again have the same rights that the widow would have had. The limitation is derived from a theory that the statute cannot have intended the executor to take

unless he took what the testator already had. We should not have derived that notion from the section, which seems to us to have the broad intent that we have expressed, and the words specially applicable seem to us plainly to import that if there is no widow or child the executor may exercise the power that the testator might have exercised if he had been alive. The executor represents the person of his testator, Littleton, § 237, and it is no novelty for him to be given rights that the testator could not have exercised while he lived. *Green* v. *Ekins*, 2 Atk. 473, 476. A familiar illustration is to be found in the Employers' Liability Act which gives to personal representatives a new cause of action for causing death, although the foundation is the original wrongful injury to the deceased. *Michigan Central R. R. Co.* v. *Vreeland*, 227 U. S. 59, 68, 70.

Decrees reversed.